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No. 94 616 OCT - 3 1994

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In The

Supreme Court of the United States

October Term, 1994

ZAPATA PROTEIN (USA), INC.
(formerly known as ZAPATA HAYNIE CORPORATION),

Petitioner,

versus

JOHN WILLIAM BUTLER,

Respondent.

Petition For Writ Of Certiorari
To The Court Of Appeal, Third Circuit
State Of Louisiana

PETITION FOR WRIT OF CERTIORARI OF ZAPATA PROTEIN (USA), INC. (formerly known as ZAPATA HAYNIE CORPORATION)

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QUESTIONS PRESENTED FOR REVIEW

I.

Do this Court's decisions in *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 106 S.Ct. 1527, 89 L.Ed.2d 739 (1989) and *American Dredging Co. v. Miller*, ___ U.S. ___, 114 S.Ct. 981, ___ L.Ed.2d ___ (1994), authorize Louisiana's intermediate appellate courts to apply a unique state constitutional standard of factual review in a suit brought pursuant to the Jones Act and General Maritime law, and, in using that standard, to substitute their judgment on an issue of credibility and reverse on the facts, without citation to any error of law?

II.

Are Louisiana Courts authorized by federal law to award prejudgment interest in a suit alleging damages arising under the Jones Act and the general maritime law, when recovery is allowed only on the Jones Act count?

III.

Is Louisiana's Constitutional requirement that appellate courts review the law and the facts, as applied in this case, an "abrogation of a well-established common law protection against arbitrary deprivation of property" which deprives petitioner of its federal due process right to meaningful appellate review under *Honda Motor Co., Ltd. v. Oberg*, ___ U.S. ___, 114 S.Ct. 2331, ___ L.Ed.2d ___ (1994)?

LIST OF PARTIES

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualifications or recusal.

(1) James B. Doyle – Woodley, Williams, Fenet, Boudreau, Norman & Brown, 500 Kirby Street, P. O. Drawer EE, Lake Charles, Louisiana 70602 (318) 433-6328, Attorneys for Zapata Protein, (USA) Inc. (formerly known as Zapata Haynie Corporation, petitioner;

(2) Joseph L. Von Rosenberg – Vice President and General Counsel of Zapata Corporation, P. O. Box 4240, 1 Riverway Suite 2200, Houston, TX 77210-4240, (713) 940-6174, Attorneys for Zapata Protein, (USA) Inc. (formerly known as Zapata Haynie Corporation, petitioner;

(3) Raleigh Newman – Attorney at Law, 1830 Hodges Street, Lake Charles, LA 70601, (318) 439-5788, Attorney for John William Butler, respondent;

(4) Honorable Frans J. Labranche, Jr. – Clerk of the Louisiana Supreme Court, 220 Supreme Court Building, 301 Loyola Avenue, New Orleans, Louisiana, 70112, (504) 568-5707;

(5) Honorable Kenneth J. deBlanc – Clerk of Third Circuit Court of Appeals, Court of Appeals, Third Circuit, State of Louisiana, P. O. Box 3000, Lake Charles, LA 70602, (318) 433-9403; and

LIST OF PARTIES – Continued

(6) Honorable H. Ward Fontenot – Judge, 38th Judicial District Court, Parish of Cameron, State of Louisiana, P. O. Drawer 578, Cameron, Louisiana 70631, (318) 775-5649.

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The unreported decisions of the Louisiana 38th Judicial District Court, the Louisiana Supreme Court's action on petitioner's application, and the Louisiana Third Circuit Court of Appeal's decision reversing the state district court's ruling, along with its denial of rehearing, are attached. The Louisiana Supreme Court's *per curiam* opinion is also reported at 639 So.2d 1186 (La. 1994). The Court of Appeal's decision is also reported at 633 So.2d 1274 (La. App. 3d Cir. 1994).

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

This Petition seeks review of the Judgment of the Louisiana Third Circuit Court of Appeal entered on February 23, 1994. Under Louisiana procedure, that judgment was not final until the Louisiana Supreme Court denied Zapata's application for writ of certiorari or review on July 5, 1994, on all relevant issues.

This Petition is filed timely pursuant to 28 U.S.C. 2101(c). This Court's jurisdiction is invoked pursuant to 28 U.S.C. 1257(a).

STATUTES AT ISSUE IN THIS CASE

The Jones Act, 46 U.S.C. 688(a):

(a) Application of railway employee statutes; jurisdiction

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain

an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

Admiralty and Maritime Jurisdiction, 28 U.S.C. 1333(1):

The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

> **(1)** Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

Old Admiralty Rule 46 1/2, 28 U.S.C. (Supreme Court Rules):

In deciding cases of admiralty and maritime jurisdiction the court of first instance shall find the facts specially and state separately its conclusions of law thereon; and its findings and conclusions shall be entered of record and, if an appeal is taken from the decree, shall be included by the clerk in the record which is certified to the appellate court under rule 49.

Federal Rules of Civil Procedure, 28 U.S.C. Rule 52(a):

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rule 12 or 56 or any other motion except as provided in subdivision (c) of this rule.

Louisiana Constitution, Article 5, Section 10(B):

(B) Scope of Review. Except as limited to questions of law by this constitution, or as provided by law in the review of administrative agency determinations, appellate jurisdiction of a court of appeal extends to law and facts. In the review of an administrative agency determination in a worker's compensation matter, a court

of appeal may render judgment as provided by law, or, in the interest of justice, remand the matter to the administrative agency for further proceedings. In criminal cases its appellate jurisdiction extends only to questions of law.

LSA-Code of Civil Procedure Article 1732(6):

A trial by jury shall not be available in: . . .

(6) A suit on an admiralty or general maritime claim under federal law that is brought in state court under a federal "saving to suitors" clause, if the plaintiff has designated that suit as an admiralty or general maritime claim.

STATEMENT OF THE CASE

John William Butler, an undisputed Jones Act seaman, was a pogy boat fisherman attached to the Zapata vessel M/V OYSTER BAYOU when he alleged injury occurring on the fourth day of his first hitch, on April 24, 1989. Immediately after reporting an injury to the master of the vessel, Butler was placed in his bunk where he began to exhibit suspicious symptoms, including a headache, "gas on his stomach, and gas on his arm." The captain treated those symptoms with aspirin and first aid.

Upon arriving at the dock, Butler was offered further medical treatment, but he became angry and left the Zapata facility. Fearful that Butler was trying to "make a case," the captain, Bruce Mason, took advantage of an investigator already in the office to assemble statements from the crew members before they dispersed. The statements uniformly verified that Butler sustained no injury-

producing accident while aboard the M/V OYSTER BAYOU, although as a part of the fishing operation, his helmet may have come in contact with an appliance (a power block) used on the fishing vessel.

After Butler left Zapata, he went, not to seek medical advice, but to the office of an attorney. After meeting with that attorney, he was transported back to Lake Charles, his home town, to see a doctor chosen by that lawyer.

In due course, Butler filed suit in state court in Cameron Parish, Louisiana, against his employer, Zapata Haynie Corporation, seeking damages and maintenance and cure. His petition invoked federal law, specifically alleging remedies under the Jones Act, 46 U.S.C. 688, and the "general maritime law." It also acknowledged the federal common law basis for the suit by citing the saving clause of 28 U.S.C. 1333. Using Louisiana procedure, Butler opted for a trial by the judge alone, precluding Zapata's jury demand. La. Code of Civil Procedure, Art. 1732 (6).

At trial, Butler's testimony was internally inconsistent. He said after being struck by the power block he was "unconscious," and he and other supporting witnesses testified he had to be carried bodily from his fishing station to the master vessel. Other witnesses saw nothing remotely similar to Butler's version of events. Witnesses who supported Butler at trial had given prior contrary statements in which they supported the company's version.

Although he had neglected to tell Zapata about it before beginning his employment duties, Butler had been injured previously in a significant automobile accident.

This prior injury left him, by his own admission, disabled from work for at least a year, and resulted in a lawsuit which sought damages for, among other things, loss of income.

Because of the trial judge's observation of Butler during trial, his prior inconsistent statements, his prior injuries, and particularly because he had lied about those prior injuries in his employment application, the court gave little credence to his testimony regarding causation of an injury-producing accident aboard the OYSTER BAYOU. Because of the witnesses' prior inconsistent statements, the Court disregarded their testimony, specifically finding their credibility, and Butler's, to be "non-existent." That being the case, Butler failed to carry his Jones Act burden of proof. 46 U.S.C. 688. By directed verdict motion, the trial judge also dismissed all claims against Zapata based on alleged unseaworthiness. Consistent with his credibility determination, he found any obligation to pay maintenance and cure extinguished. Judgment was then rendered in favor of Zapata on all counts.

Plaintiff appealed to Louisiana's Third Circuit Court of Appeal, asserting the trial judge had committed "manifest error" in making the credibility call which was the predicate for the adverse judgment. At that point, two Louisiana constitutional provisions were implicated, one (Art. 5, Section 10) which grants to Louisiana appellate courts jurisdiction to review the facts as well as the law, and another (Art. 5, Section 8) which requires referral to a five-judge panel if the initial panel votes 2-1 to reverse the decision of the trial judge. Upon referral to that five-judge panel, the Court of Appeal ultimately ruled the

trial judge had committed "manifest error" in making his credibility determination. That standard was applied despite vigorous argument by Zapata that the Court was bound, not by Louisiana's Constitutional mandate of fact review but, in this case governed by federal law, by the "clear error" doctrine as set forth in *Anderson v. Bessemer City*, 470 U.S. 546, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985).[1] The decision was released the same day as this Court's opinion in *American Dredging Co. v. Miller*, ___ U.S. ___, 114 S.Ct. 981, ___ L.Ed.2d ___ (1994), which found Louisiana's forum selection law procedural in the context of a Jones Act claim. Before its release, the instant case had been under submission almost two years.

The Court of Appeal opinion announced adherence to Louisiana's "manifest error" standard, which it equated to the "clear error" review mandated by Federal law, and said the trial court could be reversed, even on a credibility determination, if the reviewing court found "objective evidence" in the record contrary to the trial judge's decision. It then cited the following as examples of such "objective evidence:"

– Selected portions of statements taken by Zapata of witnesses who, in some instances, did not appear at trial, and were accepted at trial solely on the question of maintenance and cure;

– A comparison of portions of the testimony of two witnesses, which the trial court found, taken as a whole, rejected Butler's claim, but which the majority found

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[1] *See also, Schexnider v. McDermott Inc., et al*, 868 F.2d 717 (5th Cir. 1989).

supported it (in other words, according different weight to the evidence than did the trial judge);

– A portion of the testimony of the captain in which Butler had related being struck by the block was deemed to stand for the uncontroverted proposition that Butler connected an accident with an injury, disregarding other portions of the captain's testimony, relied on by the trial court, in which Butler complained only of a headache, "gas on his stomach, and gas on his arm;"

– Said the trial judge "overemphasized" negative factors affecting Butler's credibility, including his admitted lies on his employment application; his demonstrably vague trial testimony; fabrications involving his prior, serious accident; and his failure to be honest with the Federal Government by filing income tax returns over an extended period of time;

– Reviewed medical testimony presented by plaintiff and concluded it presented "objective" evidence of recent injury, even though the trial judge had noted on the record his personal observation of the plaintiff throughout the trial, and the inconsistency between the complaints he had made to his doctors and the lack of disability demonstrated in open court; and finally,

– Reviewed in excruciating detail Zapata's response to Butler's submission of a claim, finding Zapata had been untruthful in its claims investigation process in acknowledging that an injury-producing accident had taken place. Even if this were true, and it certainly is not, such a finding does nothing to supply the "objective" evidence the Court of Appeal says it needs to reverse a finding of credibility.

The majority opinion, then, is nothing more than a substitution of the Court of Appeal's conclusions as to the facts of the case for the trial judge's opinion, rendered on a cold record. In its ruling, after reversing the trial judge's credibility call, the Court of Appeal awarded Butler damages in excess of $800,000, including pre-judgment interest. The interest award was particularly egregious, as the Court of Appeal affirmed the trial judge's decision that the vessel in question was not unseaworthy, contravening established state and federal law which was, until this opinion, unquestioned.[2]

A dissent by two senior judges of that Court, Stoker and Domengeaux, found "no basis for concluding that the trial judge's findings of fact are not reasonably based," and said " . . . the trial judge's evaluation of the credibility of the witnesses is well supported in the record." Judge Domengeaux, now retired, had just two months previously attacked a similar majority opinion in an extraordinarily stinging dissent, saying a substitution of judgment by the same court amounted to "throw[ing] the rule books out of the window." This earlier case found its way into the general media, leading to a public airing of judicial laundry which can only be described as incredible. See "Rift between appeal court judges growing," Lake Charles American Press, December 23, 1993, reproduced in the appendix.

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[2] The Court of Appeal also departed from Louisiana's Constitution by rendering a mandate which included an award for loss of future income, with only two of the five judges concurring in the amount. This error was later corrected by the Louisiana Supreme Court's partial writ grant.

In that article, Judge Thibodeaux, the author of the majority opinion in the case now before the Court, was quoted as saying his appellate court was undergoing a "shift in philosophy," and, "[b]ecause there is criticism doesn't mean the rules of appellate review haven't been followed. It's an existing question of how you interpret those rules."

Following Louisiana procedure, Zapata filed first for a rehearing to the Court of Appeal, which was denied; and then applied for writs of certiorari to the Louisiana Supreme Court, alleging in that application the departure from Federally-mandated appellate review by the Court of Appeal; that Court's denial of this litigant's due process right to a meaningful appeal, U.S. Constitution, Amendments 5 and 14; *TXO Production Corp. v. Alliance Resources Corp.*, ___ U.S. ___, 113 S.Ct. 2711, 125 L.Ed.2d 366 (1993) and *Texaco, Inc. v. Pennzoil*, 481 U.S. 1, 107 S.Ct. 1519, 95 L.Ed.2d 1 (1987); the Court of Appeal's unprecedented award of prejudgment interest in this Jones Act case; and other errors. That Court granted the writ only on a collateral issue, denying Zapata relief from the prohibited fact-finding by the Court of Appeal, the interest award, and the due process claim.

It is from that action this petition proceeds.

ARGUMENT

In this case of first impression, the Court is called upon to decide whether Louisiana, unique among the 50 states in its view of the jurisdiction of its appellate tribunals, is free to apply a state constitutional provision

which allows a reviewing court to substitute its judgment for a trial judge's finding of fact in a suit brought pursuant to the Jones Act and federal maritime law. The impact of the questioned practice is significant, because of Louisiana's historically large contribution to the formation of that law.[3] Coupled with this Court's decision last term in *American Dredging Co. v. Miller*, ___ U.S. ___, 114 S.Ct. 981, 127 L.Ed.2d 285, 62 USLW 4130, 1994 A.M.C. 913 (1994), Louisiana is now the most favorable state court forum for plaintiffs in general maritime claims. Since the effect of *Miller* is to allow such a suit to be brought against any defendant over whom the state may exercise jurisdiction, even when the injury occurs in another state, another ocean, or another country, Louisiana's impact on this body of law will logically increase.

The state Supreme Court's denial of writ relief allows to stand a decision which is in conflict with the law of other states on the question of *de novo* fact review, as is

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[3] In the last three (3) years, of 804 cases reported in American Maritime Cases, 181 (23%) originated in Louisiana. Of 51 cases decided by this Court on admiralty or seaman topics since 1960, 11 (22%) arose in this state, including such landmark decisions as *Miller*, supra; *Miles v. Apex Marine Corp.*, 498 U.S. 19, 111 S.Ct. 317, 112 L.Ed.2d 275 (1991); *McDermott International Inc. v. Wilander*, 498 U.S. 337, 111 S.Ct. 807, 112 L.Ed.2d 866 (1991); *Offshore Logistics v. Tallentire*, 477 U.S. 207, 106 S.Ct. 2485, 91 L.Ed.2d 174 (1986); and *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352, 89 S.Ct. 1835, 23 L.Ed.2d 360 (1969). By way of contrast, larger maritime states have had less impact. In the same time frame, this Court released opinions on eight cases from New York, four from Florida, three from Texas, and two from California. According to the 1990 Federal census, Louisiana ranks 20th in population among the 50 states, with less than 2% of all Americans.

the unprecedented award of pre-judgment interest. The patchwork fashion in which Louisiana applies its rules of appellate review operates to deprive litigants of their right to a meaningful appeal guaranteed by Amendments 5 and 14 of the Federal Constitution. As such, this petition qualifies for review by this Court under Rules 10.1(b) and 10.1(c).

A. An activist state, and a Civilian island

Louisiana has never been shy about its activist role in the maritime arena. The forum selection statute upheld by this Court in *Miller* is one of three titularly procedural Louisiana twists designed to impact federal maritime law. The other two involve fact review, the matter at issue here, and the right of all parties to demand a jury trial in an "at law" maritime case brought in state court.[4]

In 1988, the Louisiana Legislature enacted Article 1732(6) of the Louisiana Code of Civil Procedure, which allows to the plaintiff alone the opportunity to designate an action in state court as one brought under the "general maritime law." If the plaintiff so designates, the case must

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[4] Although not limited to maritime cases, another Louisiana device makes its courts particularly attractive to plaintiffs. Here, as in only one other state, a "direct action" may be maintained against insurers. La. R.S. 22:655. The Louisiana Supreme Court held last year that this procedure may be employed even against foreign protection and indemnity clubs claiming vessel owners as their members. *Grubbs v. Gulf International Marine, et al.*, 625 So.2d 495 (La. 1993).

proceed, as this one did, to trial before a judge alone. That issue has not yet reached this Court except by denial of certiorari,[5] but the United States Fifth Circuit Court of Appeal has said Louisiana's statute does not amount to the creation of a state admiralty jurisdiction. *Linton v. Great Lakes Dredge & Dock Co.*, 964 F.2d 1480 (5th Cir. 1991), *cert. denied* ___ U.S. ___, 113 S.Ct. 467, 121 L.Ed.2d 375 (1992).

Louisiana's scheme of appellate review applies to all cases, maritime as well as non-maritime. But coupled with the other two devices, and considering Louisiana's civil law tradition, it has substantive effect on maritime cases in a way different in character from all other likely forums. Indeed, Louisiana is the only state whose appellate judges now believe they are free to perform what amounts to a *de novo* review of facts in a maritime case.[6]

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[5] *Parker v. Rowan Companies, Inc.*, 599 So.2d 495 (La. 1992) *cert. denied sub nom., Rowan Companies, Inc. v. Parker*, ___ U.S. ___, 113 S.Ct. 203, 121 L.Ed.2d 145 (1992).

[6] Although Louisiana has more than 40 cited cases on this issue since 1970, most other states have none. Those ruling on the issue apply the federal "clearly erroneous" standard of fact review in maritime cases, either of its own weight, or because it comports with state standards of review in other cases. See, *e.g.*, *Reveia v. Marine Drilling Co.*, 800 S.W.2d 252 (Tex. App. 1990); *Maritime Overseas Corp. v. Ellis*, 1994 WL 289148 (Tex. App. 1994); *Texaco Refining & Marketing v. Estate of Dau Van Tran*, 808 S.W.2d 61 (Tex. 1991); and *Potashnick-Badgett Dredging Inc. v. Whitfield*, 260 So.2d 36 (Fla. App. 1972). Three other states apply federal standards in FELA cases, treated the same as maritime claims by federal law. *Baltimore and Ohio Railroad Co. v. Taylor*, 589 N.E.2d 267 (Indiana App. 1992); *Szopko v. Kinsman Marine Transit Co.*, 397 N.W.2d 171, 1987 AMC 2081 (Michigan 1986), and *Monagham v. Union Pacific Railroad Co.*, 496 N.W.2d 895 (Nebraska 1993).

Since the plaintiff in such a lawsuit can, consistent with state procedure, pick the jurisdiction, pick the venue (and therefore the judge), sue the insurer directly (bypassing even bankrupt defendants) and dispense with a jury, the guardianship of federal maritime law in a nationally significant number of cases passes to the elected judges of Louisiana's intermediate appellate courts.[7]

While it is true much discussion exists equating Louisiana's "manifest error" fact review with the "clear error" doctrine, such as in *Daigle, infra,* and Judge Stoker's dissent in this case, close scrutiny of such authority shows Louisiana's application of those principles is attitudinal rather than doctrinal. More often than not, when a Louisiana appellate court wants to reverse on the facts, it does.[8]

In Louisiana, appellate courts have *jurisdiction* to review the law and the facts.[9] This provision has often been described as creating a constitutional duty to review the facts

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[7] There is no "of right" appeal in civil cases to Louisiana's Supreme Court. La. Constitution of 1974, Art. 5, Section 5A.

[8] See, *e.g., Hines v. Remington Arms Company, et al.,* 630 So.2d 809 (La. App. 3d Cir. 1993) (writ granted and decision pending by La. Supreme Court); *Kelley v. Louisiana Limestone Aggregates,* 630 So.2d 828 (La. App. 3d Cir. 1994), writ denied; *Lewis v. State Dept. of DOTD,* 1994 WL 460684 (La. App. 2d Cir. 1994); and *Ambrose v. New Orleans Police Department Ambulance Service, et al.,* 639 So.2d 216 (La. 1994).

[9] *Arceneaux v. Domingue,* 365 So.2d 1330 (La. 1978).

found by trial courts.[10] In this regard, Louisiana's view of its place in the world of civil law, as opposed to the English common law tradition of the remaining states, provides impressive support for the argument that the questioned procedure has substantive effect:

> "Under the civilian tradition of our state, the courts have been given a broad, general principle of legislative will from which they are required to determine when the interest of society is best served by requiring one who harms another to respond in damages for the injury caused. In deciding whether the conduct in a specific case falls below that in which a person can engage without becoming responsible for resultant damage, a court must refer first to the fountainhead of responsibility, Article 2315, and next in applying the article to the many other articles in our code which deal with the responsibility of certain persons or that which arises due to certain types of activities. After searching through the code itself, a jurist should refer in turn to the acts of the legislature, local governments, and other legislative and administrative bodies. Then, having explored the legislative and administrative sources for standards of proper conduct, a court should turn next to the experience of the judiciary in the interpretation and application of these standards to actual situations.

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[10] *Mara v. Mara*, 452 So.2d 329 (La. App. 4th Cir. 1984); *Bossier v. DeSoto General Hospital*, 442 So.2d 485 (La. App. 2d Cir. 1983).

> . . . [I]t is important that we plainly state that, particularly in the changing field of delictual responsibility, the notion of *stare decisis*, derived as it is from the common law, should not be thought controlling in this state. The case law is invaluable as previous interpretation of the broad standard . . . , but it is nevertheless secondary information. *Ardoin v. Hartford Accident & Indemnity Co.*, 360 So.2d 1331 (1978).

That such an attitude creates a substantive difference in the law is seen perhaps more clearly from a distance. In a case arising in New Jersey, Louisiana law, including the constitutional fact review provision at issue here, was singled out in an exposition of the differences in civilian and common-law review:

> Although there is a distinction between the sanctity of jury fact-finding protected by the Seventh Amendment and the extremely limited review of facts found by a judge permitted under the clearly erroneous rule, in neither event does common law tradition permit a reviewing court to consider evidence which was not before the tribunal of the first instance . . .
>
> Civil law tradition permits re-examination of facts through the courts of the second instance . . . This takes place in the intermediate courts of appeal . . .
>
> . . . In Louisiana, our only state that traces its judicial process to the Napoleonic Code of France, the state's courts of appeal (the courts of second instance) may review facts.[11]

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[11] *Haines v. Liggett Group, Inc.*, 975 F.2d 81 (3d Cir. 1992), at pp. 92-93.

With this recognition, a court 1,500 miles from New Orleans expresses an understanding of Louisiana's system better than this state's own Supreme Court. No better example may be found than the decisions cited at footnote 8, *supra*, particularly *Ambrose*, which was decided the same day the same court denied Zapata's writ in this case. There, after quoting language no different from this Court's *Anderson* rule,[12] the Court nevertheless reversed a jury finding of gross negligence. And lest there be any doubt this was done under traditional Civilian review, the majority added, in footnote 6 at page 221, a specific finding that the reversal was made on the *facts*, not on "sufficiency of the evidence" as a matter of law.

Federal maritime law is federal common law. Martin J. Norris, *The Law of Seamen*, § 1:3 (4th ed. 1985). Federal common law is judge-made, and relies heavily on the doctrine of *stare decisis*. As this Court has explained:

> Very weighty considerations underlie the principle that courts should not lightly overrule past decisions. Among these are the desirability that the law furnish a clear guide for the conduct of individuals, to enable them to plan their affairs with assurance against untoward surprise; the importance of furthering fair and expeditious adjudication by eliminating the need to relitigate every relevant proposition in every case; and the necessity of maintaining public faith in the judiciary as a source of impersonal and reasoned judgments. The reasons for rejecting any

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[12] " . . . where two permissible views of the evidence exists (sic), the factfinder's choice between them cannot be manifestly erroneous or clearly wrong . . . ," at pp. 220-1.

established rule must always be weighed against these factors. *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed. 2d 339 (1970).

In the case at bar, applying a federal common law standard of review would result in the trial court's decision being affirmed because, even if it existed, the "objective evidence" sought by the Court of Appeal would have been irrelevant to review of that decision. As the opinion itself demonstrates, what is "objective" is often in the eye of the beholder.

B. Louisiana's erroneous application of the *Worthington* doctrine.

Other strong support for Zapata's position in this Court's *Miller* inquiry is found in Louisiana's historic treatment of "clear error" review as substantive in maritime cases. That treatment changed only as a result of an inappropriate reading of one of this Court's decisions.

Prior to 1986, Louisiana courts were uniform in their recognition that federal fact finding applied to suits brought under the Jones Act and General Maritime Law.[13]

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[13] See, eg, *Presley v. Upper Mississippi Towing Corp*, 141 So.2d 411 (La. App. 1st Cir. 1961); *Galiano v. Harris Doucet's Sons, Inc.*, 201 So.2d 5 (La. App. 1st Cir. 1967); *Ferdinandtsen v. Delta Marine Drilling Co.*, 235 So.2d 641 (La. App. 4th Cir. 1970); *Morris v. M/V CREOLE BELLE*, 394 So.2d 727 (La. App. 3d Cir. 1981); *Cooper v. Keys Offshore, Inc.*, 421 So.2d 385 (La. App. 1st Cir. 1982); *Portier v. Texaco Inc.*, 426 So.2d 623 (La. App. 1st Cir. 1983); *Sutton v. Central Gulf Lines, Inc.*, 433 So.2d 888 (La. App. 5th Cir. 1983); *Symeonides v. Cosmar Compania Naviera, S.A.*, 433 So.2d 281 (La.

Although not universally true, Louisiana's rule regarding the federal standard changed after this Court's decision in *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 106 S.Ct. 1527, 89 L.Ed.2d 739 (1989). A study of cases citing *Worthington* shows this change is a direct result of *dicta* contained in that opinion.

In attempting to differentiate prior jurisprudence regarding the clearly erroneous standard in suits brought pursuant to the Fair Labor Standards Act, 29 U.S.C. 207, *et seq.*, this Court in *Worthington* analyzed its prior opinion in *Levinson v. Spector Motor Service*, 330 U.S. 649, 67 S.Ct. 931. The *Levinson* opinion affirmed a decision made by the Supreme Court of Illinois, and because *Levinson* had come up through the state system, this Court in *Worthington* distinguished it for purposes of applying 52(a) standards of review, saying:

> We think that neither Levinson or Rutherford should be read to depart from the rule laid down . . . Levinson involved a case that was brought to this Court from the Supreme Court of Illinois, and that Court had accepted the factual findings made by the Illinois Appellate Court, but state courts are not required to apply Rule 52(a) - a rule of *federal* civil procedure - to their own appellate system for reviewing factual determinations of trial courts.

Worthington, at pg. 1529, 713 U.S.

App. 1st Cir. 1983); *Bonsack v. Keystone Shipping Co.*, 425 So.2d 869 (La. App. 3d Cir. 1982); *Wright v. Ocean Drilling and Exploration Co.*, 461 So.2d 1084 (La. App. 4th Cir. 1984); and *Wilson v. Arthur Levy Enterprises, Inc.*, 491 So.2d 76 (La. App. 1st Cir. 1986).

The *Worthington* opinion had immediate impact on Louisiana's standard of review. Three weeks to the day after it was handed down, the Louisiana Supreme Court in *Daigle v. Coastal Marine, Inc.*, 488 So.2d 679 (La. 1986), cited *Worthington* as approving application of Louisiana's "manifest error" standard in Jones Act cases, a result this Court could not likely have foreseen. But that was not the end of the story. In fact, even after the *Worthington* and *Daigle* decisions, some Louisiana courts continued to apply federal "clearly erroneous" standards,[14] as all Louisiana courts currently do in FELA cases which, because of their federal origin and FELA's incorporation into the Jones Act, should be treated similarly.[15]

The question, of course, is not whether Louisiana is different; it is. As the Court said in *Miller, supra*, the inquiry is directed towards " . . . whether Louisiana's rule 'interferes with the proper harmony and uniformity' of maritime law, or works 'material prejudice to [a] characteristic featur[e] of the general maritime law,' " quoting *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 37 S.Ct. 524, 61

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[14] *See, e.g., Bennett v. Sedco Maritime*, 520 So.2d 894 (La. App. 3d. Cir. 1987); *Osorio v. Waterman Steamship Corp.*, 557 So.2d 999 (La. App. 4th Cir. 1990); *Mistich v. Pipelines, Inc.*, 609 So.2d 921 (La. App. 4th Cir. 1992); *Jenkins v. Kerr-McGee Corp.*, 613 So.2d 1097 (La. App. 3d Cir. 1993); *Forrest v. Waterman Steamship Corp.*, 617 So.2d 59 (La. App. 4th Cir. 1993); *Barks v. Magnolia Marine Transport Co.*, 617 So.2d 192 (La. App. 3d Cir. 1993); *Sanders v. Tidewater Inc.*, 635 So.2d 365 (La. App. 4th Cir. 1994); *Wilson v. Compass Dockside, Inc.*, 635 So.2d 1171 (La. App. 4th Cir. 1994); *Caravalho v. Dual Drilling Services, Inc.*, 631 So.2d 725 (La. App. 3d Cir. 1994).

[15] *Jackson v. Kansas City Southern Railway*, 619 So.2d 851 (La. App. 3d Cir. 1993); *Duford v. Union Pacific Railroad Co.*, 610 So.2d 843 (La. App. 1st Cir. 1992).

L.Ed. 1086 (1917). There is no doubt Louisiana's treatment of this issue is substantive, because until the opportunistic seizure of the *Worthington dicta*, it was treated as such by the unanimous consent of all Louisiana courts. That second-chance fact review creates inconsistent standards of care, since most of those are tailored to specific acts, is beyond question. See, *e.g.*, *Ambrose* and *Hines*, *supra*. Uncertainty of result is one of the specific *Miller-Jensen* criteria requiring this Court's intervention in protection of the maritime law, and if consistency of result in Louisiana depends on findings of fact by judicial officials selected in the same election as other political officers, the danger of bias always exists.[16]

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[16] Although not entirely directed toward the issue at hand, the problem of elected judges was certainly considered by Hamilton in arguing for a life-tenured federal judiciary:

> But it is not with a view to infractions of the Constitution only, that the independence of the judges may be an essential safeguard against the effects of occasional ill humors in the society. These sometimes extend no farther than to the injury of the private rights of particular classes of citizens, by unjust and partial laws . . . The benefits of the integrity and moderation of the judiciary have already been felt in more States than one; and though they may have displeased those whose sinister expectations they may have disappointed, they must have commanded the esteem and applause of all the virtuous and disinterested. Considerate men, of every description, ought to prize whatever will tend to beget or fortify that temper in the courts; as no man can be sure that he may not be to-morrow the victim of a spirit of injustice, by which he may be a gainer today . . .
>
> Hamilton, *The Federalist*, First Modern Library Edition, 1941, No. 78, at pp. 509-10.

Freedom from appellate fact review absent clear error is a traditional feature of the admiralty. Former Admiralty Rule 46 1/2, subsumed into rule 52(a) of the Federal Rules of Civil Procedure, has *always* provided that cases brought pursuant to the admiralty are subject to a "clearly erroneous" factual review. *Louis Dreyfus and Cie v. Panama Canal Co.*, 298 F.Supp. 733, 737 (1962).

Absent the Jones Act, Butler could not have maintained this suit against his employer under Louisiana law. La. R.S. 23:1032 *et seq*. Absent the Saving Clause and the "common law" remedy divined in the language of the Jones Act itself, Butler would have brought his claim in an admiralty court of the United States. Since no error of law by the trial judge has been identified, this case, under such a regime, could not have been reversed.

Absent this Court's *Worthington dicta*, Louisiana courts would still apply federal standards of review, believing, as they continue to in the FELA cases cited *supra*, that such a result is mandated as a matter of substantive federal law. To the extent *Worthington* stands for the proposition that federal appellate review standards do not apply in state court, it must be modified or amended to specifically exempt cases brought pursuant to the federal maritime law from that requirement.

C. Absent a finding of unseaworthiness, the Court was prohibited from awarding Butler prejudgment interest.

The Court of Appeal further demonstrated its intention not to be bound by the clear mandate of federal law in awarding Butler prejudgment interest on "all items of

damages except future non-economic losses . . . " In so doing, the challenged decree departs dramatically from established precedent in an area clearly included within the substantive maritime law.

As in other types of awards before this Court's *Miles* decision, *supra* at footnote 3, prejudgment interest is available in claims based on general maritime law, but not under the Jones Act.[17] By its terms, the Court of Appeal opinion dealt with only one issue which would have given Butler such a claim, the alleged unseaworthiness of the Zapata vessel, and affirmed the trial court's directed verdict in favor of Zapata on that count. Its award of prejudgment interest on the Jones Act claim, brought "at law" in state court, is a departure from the substantive law of admiralty which stands alone in the jurisprudence.

The U.S. Fifth Circuit has long held this is so.[18] And even when such an award is made, it is limited to past losses.[19] To the extent there is contrary authority, it is distinguishable. The Second Circuit has said prejudgment interest is available, only because, quoting treatise authority, "[s]ince the recovery is the same under either count, the question whether [plaintiff] recovers for negligence or for unseaworthiness is hardly worth asking."[20]

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[17] Such as damages for loss of consortium. *See, e.g., American Export Lines v. Alvez*, 446 U.S. 274, 100 S.Ct. 1673, 64 L.Ed.2d 284 (1980).

[18] *Theriot v. J. Ray McDermott & Co., Inc.*, 742 F.2d 877 (5th Cir. 1984); *Simeon v. T. Smith & Co.*, 852 F.2d 1421 (5th Cir. 1988).

[19] *Ibid.*

[20] Gilmore & Black, *The Law of Admiralty*, 383 (2d ed. 1975), quoted in *Magee v. U.S. Lines, Inc.*, 976 F.2d 821 (2d Cir. 1992), at page 823.

But this decision is aberrational, and, as pointed out by the Fifth Circuit, contrary to this Court's clear guidance:

> [Plaintiffs] contend . . . that the jury's verdict of Jones Act negligence necessarily includes a finding of unseaworthiness. We cannot agree. . . . [T]he Jones Act and unseaworthiness are distinct theories of recovery. The settled rule in the Fifth Circuit is that there is no fundamental, necessary inconsistency between the two verdicts of negligence and seaworthiness.[21]

Louisiana is even more consistent. Before this case, there has never been a state award of prejudgment interest absent a finding of general maritime law negligence. Three cases, two in the same court of appeal as this one, deny *all* prejudgment interest when no specific portion is awarded for general negligence as opposed to Jones Act liability.[22]

In the absence of action on this petition, this case will enlarge the general maritime law on the availability of a substantive item of damages, and, like the fact review issue, is an impermissible state encroachment into an area of exclusively federal responsibility. It must not be allowed to stand.

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[21] *Simeon, supra,* at page 1433, citing *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 80 S.Ct. 926, 4 L.Ed.2d 941 (1960), and *Usner v. Luckenbach Overseas Corp.*, 400 U.S. 494, 91 S.Ct. 514, 27 L.Ed.2d 562 (1971).

[22] *Marsh v. Penrod Drilling Co.*, 619 So.2d 1124 (La. App. 4th Cir. 1993); *Savoie v. McCall's Boat Rentals, Inc.*, 491 So.2d 94 (La. App. 3d Cir. 1988); *Ellender v. Texaco, Inc.*, 425 So.2d 291 (La. App. 3d Cir. 1982).

D. The state constitutional mandate of fact review, without effective standards or limits on that review, amounts to a deprivation of this litigant's due process right to a meaningful appeal.

Although mostly in the context of punitive damage cases, this Court has made clear federal due process requires state court litigants be afforded meaningful access to appellate review.[23]

As Justice Stevens has said:

> [A State's] abrogation of a well-established common law protection against arbitrary deprivations of property raises a presumption that its procedures violate the Due Process Clause. As this Court has stated from its first Due Process cases, traditional practice provides a touchstone for constitutional analysis [citations omitted]. Because the basic procedural protections of the common law have been regarded as so fundamental, very few cases have arisen in which a party has complained of their denial. . . .
>
> Nevertheless, there are a handful of cases in which a party has been deprived of liberty or property without the safeguards of common law procedure [citations omitted]. When the absent

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[23] *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 107 S.Ct. 1519, 95 L.Ed.2d 1 (1987), particularly the concurrence of Justice Brennan; *Honda Motor Co., Ltd. v. Oberg*, ___U.S.___, 114 S.Ct. 2331, ___L.Ed.2d___ (1994); *TXO Production Corp. v. Alliance Resources Corp.*, ___U.S.___, 113 S.Ct. 2711, ___L.Ed.2d___ (1993); and *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991).

> procedures would have provided protection against arbitrary and inaccurate adjudication, this Court has not hesitated to find the proceedings violative of Due Process.[24]

Because the Louisiana Supreme Court has abandoned its responsibility to supervise the intermediate appellate courts, our state has a system of judicial review run amok. As a result, this Court is called upon, not to substitute its authority for a state system, but to intervene on the side of fairness to protect this litigant against a state invasion of its Federal Due Process rights.

That the Louisiana Supreme Court has indeed failed in its mission is not open to serious question. Judge Stoker practically dared that Court to either change its rules of appellate review, or reverse the anarchical result reached by the majority here.[25] But his plea fell on deaf ears.

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[24] *Oberg*, at pp. 2339-40.

[25] "The majority opinion in this case is a clear manifesto by the majority setting forth its intention not to be governed by the manifest error-clearly wrong standard for appellate review established by the Louisiana Supreme Court. It is a patent challenge to the authority of the supreme court to jurisprudentially establish the rule. Without the jurisprudentially established rule limiting the constitutional authority of the courts of appeal of Louisiana to review facts as well as law, the appellate courts would apparently have wide open authority to assess anew the evidence and testimony in trial records and cavalierly make their own findings of fact regardless of the findings of fact made by the trier of fact." Dissent of Judge Stoker, reproduced in the appendix.

Louisiana's rules of appellate review, properly interpreted, are not the problem; they set up a standard similar, if not identical to, the common law.[26] The problem is Louisiana's application of the standard. As conclusively demonstrated in Section A, the Louisiana constitutional provision challenged operates in practice as a license for the intermediate appellate courts to issue any ruling a majority of its elected judges wants and justify it later, even if doing so means, as Judge Stoker implies in his dissent, the court must engage in questionable citation of prior law.[27] This results-oriented approach is allowable in decisions made by political bodies, but not by the judiciary.

Second-chance review, creating a situation where the rule of decision is "majority rule" without resort to established precedent, deprives litigants, particularly those engaged in interstate or foreign commerce with only minimum judicial contacts with Louisiana,[28] of the certainty of result required to meet minimum federal due process standards. It cannot be gainsaid that exposure to repeated factual review has no such impact, with the expense

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[26] *See, e.g., Arceneaux v. Domingue*, 365 So.2d 1330 (La. 1978); *Canter v. Koehring Co.*, 283 So.2d 716 (La. 1973); *Rosell v. ESCO*, 549 So.2d 840 (La. 1989); and *Stobart v. State Through DOTD*, 617 So.2d 880 (La. 1993).

[27] "In referring to *Stobart* the majority quotes from the opinion to some extent, but (without so indicating) omits highly significant language [which would have precluded the majority, had it been followed, from substituting its judgment for the trial court's on a credibility call]." Stoker dissent, appendix.

[28] As might be haled before a Louisiana court after *Miller, supra*.

attendant to a never-ending trial leaving parties with two bad choices: settle undeserving cases, or bear exorbitant costs to defend yourself, with no guarantee of result.

When such a violation of federal rights has occurred, this Court has vindicated them.[29] It should do likewise here.

CONCLUSION

This case presents no factual dispute. The result will depend on a determination, not of the correctness of Judge Ward Fontenot's decision in Cameron Parish, but on his power to make it, free from unwarranted interference by a results-oriented court of appeal. If federal fact review is substantive, as Louisiana believed until 1986, it is dispositive in petitioner's favor of the issue presented.

While Questions 2 and 3 present independent reasons this Court should grant the petition, consistent with its duty to guard federal rights in both the constitutional and maritime arena, the first is meritorious in and of itself.

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[29] *See, e.g.*, cases cited at footnote 22, *supra*; *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 92 S.Ct. 1400, 31 L.Ed.2d 768 (1972).

For the reasons stated, then, this Court should grant petitioner's application and reverse the decision of the court of appeal.

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APPENDIX

NO. 92-71

COURT OF APPEAL, THIRD CIRCUIT

STATE OF LOUISIANA

JOHN WILLIAM BUTLER

Plaintiff – Appellant

VERSUS

ZAPATA HAYNIE CORPORATION

Defendant – Appellee

On appeal from the Thirty Eighth Judicial District Court, Parish of Cameron, State of Louisiana; the Honorable Ward Fontenot, District Judge, Presiding.

BEFORE: DOMENGEAUX, C.J., STOKER, THIBODEAUX, COOKS and SAUNDERS, Judges.

THIBODEAUX, Judge.

In this action brought under the Jones Act, 46 U.S.C. § 688, for negligence, the general maritime law for unseaworthiness of the vessel, and for punitive damages, attorney fees, and penalties for failure to provide maintenance and cure, the plaintiff, John Butler, appeals a judgment in favor of Zapata Haynie Corporation, defendant and owner of the fishing vessel, M/V Oyster Bayou, on which plaintiff claims he was injured on April 24, 1989.

After the presentation of plaintiff's case in this nonjury trial, the trial court granted Zapata's motion for involuntary dismissal of the unseaworthiness claim. At the completion of the trial, the court concluded that an

accident had not occurred and dismissed plaintiff's remaining claims.

John Butler filed this appeal from the judgment of the trial court. We affirm the judgment as it relates to the dismissal of the unseaworthiness claim, and reverse and render on the Jones Act negligence claim and the refusal to award maintenance and cure benefits. We decline to award punitive damages and attorney fees.

FACTS

Butler was a member of the crew of the M/V Oyster Bayou which was engaged in catching menhaden, or "pogy," fish in the Gulf of Mexico. His job was that of a cork puller in the mate boat, one of two purse boats which is a powered launch carried by the main vessel, or "steamer." The purse boats encircle the schools of menhaden with a large drawn net. Each purse boat has a power block mounted on a large swivel boom. This power block weighs approximately 300 pounds and is used to lift the net after the fish are caught. It is hydraulically powered from the engine on the purse boat.

Butler claims he was struck on the left side of his head by the power block which was being operated by Aldoise "Cookie" Hampton whose regular job was that of a cook or ring setter. This blow caused a herniated cervical disc at the C5-6 level of the neck as the principal injury which left him disabled.

John Butler, the plaintiff, testified that he was working in the mate purse boat with, among others, Frank Robinson and Aldoise "Cookie" Hampton, the block

operator. The block was located behind him as he was working with the net near the time the accident occurred. George Lemelle, a crew member, yelled at him to "watch out." At about that time, he saw Hampton "fighting" with the control levers. As he turned to determine what danger was involved, he was almost immediately struck by the block. He recalls waking up later in his bunk in the "hold" of the boat.

When his captain, Bruce Mason, visited him in the hold, he advised Mason of pain in his head, chest and left arm areas. Shortly thereafter, Mason brought him ashore and instructed him to report the incident to his pilot because of Mason's inability to write a report. As he, Butler, was giving a narrative to the pilot, Mason interrupted them and accused Butler of "making a case." Butler testified that Mason then escorted him off of the premises. He ultimately went home after returning to Zapata's plant to request that an accident report be made.

According to Butler, a friend offered to transport him to a doctor on April 25th, the day after the accident. Instead, he was brought to Attorney Gano Lemoine's office who arranged an appointment with Dr. Frank Robbins, a specialist in industrial medicine and Board certified in surgery and emergency medicine. Butler was examined by Dr. Robbins on April 26, 1989. Dr. Robbins referred him to Dr. William Foster, a neurosurgeon, who recommended physical therapy. Dr. Robbins also recommended an MRI diagnostic procedure, but Butler had to forgo this testing because no one would pay for it, including Zapata.

Butler's testimony was corroborated by Oscar Dudley, a cousin by marriage. Because of a malfunction in the netting process, the fish could not be lifted and pumped into the steamer. Consequently, the fish had to be released. A crewman yelled for the ring setter to operate the block for the purpose of swinging it over. Apparently, according to Dudley, the incorrect lever was used by the operator which caused the block to swing around and strike Butler. Dudley further testified that the block had been functioning improperly and the crew had knowledge of this. Specifically, he stated that it was difficult for an operator to control the direction of the block swing once it began moving. He assisted the plaintiff in getting to the steamer after the occurrence. Butler advised him that his hand, arm and back areas were in pain.

In his initial statement given to Joanna "Jody" Olsen, the claims representative for Zapata, two days following the accident, Dudley stated that he heard someone yelling to move the power block and heard the power block striking Butler's helmet on the left side, but Butler continued to work. Butler later told him that his arm was bothering him and he had a headache. Dudley's deposition testimony contradicted his initial statement in that it substantially tracked his trial testimony. His deposition and trial testimony emphatically stated that Butler was hit in the head and bent over, but not to the floor level after being hit. When confronted with the disparities in his various statements, Dudley explained that he was less than truthful in his statement to the claims representative because he wanted to preserve his bonus of $500.00 which each crew member received for an accident-free season.

George Lemelle, another crew member of the M/V Oyster Bayou, testified that he saw the block strike Butler on the left side of the head. After the blow, Butler was taken down to his bunk area of the steamer.

In support of its position that an accident did not occur, Zapata's captain, Bruce Mason, testified that he witnessed an occasion on April 24th when Butler's hat brim was hit by the power block. Butler, however, continued working and the fishing operation was not interrupted. Mason felt that Butler was uninjured by the minor impact. When he later checked on Butler in the bunk area of the steamer, Butler was experiencing difficulty in "catching his breath," although Mason admitted that Butler was also complaining about pain in his head area for which he supplied some aspirin. Mason subsequently filed an accident report and described the accident as "minor."

On cross-examination, Mason indicated that he had heard crew members talking about Butler being hit by the power block. He further admitted that it was possible for Butler to become injured by an event which he did not witness. Butler initially voiced a desire for medical treatment but, according to Mason, changed his mind after they engaged in an argument.

Mason's testimony also verified that the company had problems with the controls on the power block "for a period of time" before the accident, but he was uncertain if the problem was corrected before leaving on the date of the accident.

The other primary defense witness on the issue of liability was Aldoise "Cookie" Hampton, the power block

operator on the day of the accident whose regular job was that of a cook and ring setter on the boat. Hampton said that nothing was wrong with the power block. The block, however, could have struck Butler without his (Hampton's) knowledge. He admitted moving the block because it appeared as though a collision between the purse boat and the steamer was imminent. He admonished the crewmen to "look out" when the block began moving. Hampton did not see Butler being hit; he only heard about it from crew members. However, he went into Butler's bunk area to inquire about his condition because he knew that Butler had "got hurt." He testified that he observed a "nail scratch" on Butler.

TRIAL COURT'S FINDINGS

The ultimate conclusion of the trial court was that Butler failed to prove an accident. It reached this determination by judging the plaintiff's case *solely* on the credibility of John Butler, the plaintiff, and two of his witnesses, Oscar Dudley and George Lemelle, who was mistakenly identified as "Philip Lemelle" in the trial court opinion. It identified their credibility as "nonexistent" while apparently giving credence to the testimony of the two main witnesses for Zapata on the issue of liability.

For the reasons expressed below, the trial court was manifestly erroneous in its findings.

ISSUES

The issues are:

(1) Whether the trial court committed manifest error in failing to find that an accident occurred;

(2) Whether the trial court committed manifest error in failing to find negligence on the part of Zapata Haynie Corporation;

(3) Whether the trial court committed manifest error in granting a directed verdict on the issue of unseaworthiness and in failing to find that thc M/V Oyster Bayou was unseaworthy;

(4) Whether the trial court committed manifest error in failing to make an award for maintenance and cure; and,

(5) Whether the trial court committed manifest error in failing to find the actions of Zapata Haynie to be arbitrary and capricious for their failure to pay maintenance and cure, in failing to award penalties, punitive damages, and attorney fees against Zapata on the issue of maintenance and cure.

DISCUSSION

An appellate court in Louisiana is constitutionally authorized to review both law and facts. La. Const. art. V, § 10(b). This court is acutely aware of the oft-quoted rules of appellate review. Just recently in *Stobart v. State of Louisiana, Through DOTD*, 617 So.2d 880, 882 (La. 1993), our supreme court instructed us that:

(1) A court of appeal may not set aside a trial court's or a jury's finding of fact in the absence of 'manifest error' or unless it is 'clearly wrong.' Rosell v. ESCO, 549 So.2d 840 (La. 1989). This court has announced a two-part test for reversal of a factfinder's determinations:

1) The appellate court must find from the record that a reasonable factual basis does not exist for the finding of the trial court, and

2) the appellate court must further determine that the record establishes that the finding is clearly wrong (manifestly erroneous).

See Mart v. Hill, 505 So.2d 1120, 1127 (La. 1987).

This test dictates that a reviewing court must do more than simply review the record for some evidence which supports or controverts the trial court's finding. Id. *The reviewing court must review the record in its entirety to determine whether the trial court's finding was clearly wrong or manifestly erroneous.*

Even though an appellate court may feel its own evaluations and inferences are more reasonable than the factfinder's, reasonable evaluations of credibility and reasonable inferences of fact should not be disturbed upon review where conflict exists in the testimony. Rosell v. ESCO, 549 So.2d 840 (La. 1989); Arceneaux v. Domingue, 365 So.2d 1330 (La. 1978). *However, where documents or objective evidence so contradict the witness's story, or the story itself is so internally inconsistent or implausible on its face, that a reasonable factfinder would not credit the witness's story, the court of appeal may find manifest error or clear wrongness even in a finding purportedly based*

> *upon a credibility determination.* Rosell, 549 So.2d at 844-45. (Emphasis supplied).

Balanced against these directives is the idea that:

> "[t]he principles of appellate review do not require an appellate court to affirm the trier of fact's refusal to accept as credible uncontradicted testimony or greatly preponderant objectively-corroborated testimony where the record indicates no sound reason for its rejection and where the factual finding itself has been reached by overlooking applicable legal principles. Mart v. Hill, 505 So.2d 1120 (La. 1987).

Dugas v. Fontenot Motors, 510 So.2d 1374, 1376 (La. App. 3d Cir. 1987). In other words, an intermediate appellate court is not required to follow blindly the factual determinations of a trial court without discerning whether that court's discretion in evaluating facts and credibility has been abused. Certainly, the fact finder should be accorded great latitude and discretion, but discretion must always be buttressed by sound judgment. It is not immutable. To extend the quality of immutability to a fact finder's determinations simply because it articulates the magical word, "credibility" effectively limits and circumvents an appellate court's constitutionally given power to review facts.

Against this background, then, what documents, objective evidence, objectively-corroborated testimony, or uncontradicted testimony exist which militate in favor of rejecting the trial court's factual findings and credibility determinations?

The trial court specifically found that "[p]laintiff's version of events rest [sic] *solely* upon his testimony and

that of two other crew members of the M/V Oyster Bayou, namely Oscar Dudley and George Lemelle." (Emphasis supplied). The record does not support this finding. Zapata's claims representative took recorded statements from each crew member on April 26, 1989. The statements were later transcribed and entered into evidence. Frank Robinson, for example, saw Butler being struck by the rear of the block. Robinson declared that if Butler had been hit with the "front" portion of the mechanism, he would have been killed. This obviously demonstrates the intensity of the force by which the 300 pound block is propelled by hydraulic power. The force, according to Robinson, knocked Butler off the rail – he was "bent over" and "went down." This statement corroborates what Dudley observed, that Butler was hit in the head and "bent over." Butler did not appear to be hurt, although he was definitely hit. Nonetheless, Butler complained to Robinson about chest pains, a headache, and pain from his head to his arm. Because Captain Mason was busy, he did not witness the incident, Robinson's statement indicated.

The trial court observed that the Butler – Lemelle – Dudley versions of the accident were "directly contradicted by Bruce Mason . . . and Aldoise Hampton." This observation again is not supported by the record. Mason admitted witnessing an incident of the power block striking the brim of Butler's hat. Mason testified that "*I seen when he got hit* the time I seen him get hit" and "[w]e wasn't up against the steamer. That's the reason I say I don't know when this fellow got hit. *I seen him get hit* . . . " On cross-examination, Mason simply denied that Butler was injured by what he claimed to be a minor

accident, but did not repudiate the fact of some contact of the 300 pound block with Butler's hat. Thus, Captain Mason's version does not contradict Butler's; in fact, it corroborates it. The only divergence concerns the *severity* of the impact which is an issue for resolution by the medical providers.

Hampton admitted that he may not have been able to see everything from his position as operator of the block. He simply stated that he did not see anyone being hit by the block and did not notice any work interruption. In fact, Hampton's testimony corroborates to a certain extent the plaintiff's version. The block could have struck Butler without Hampton's knowledge, according to Hampton. Moreover, Hampton hollered "look out" when the block started to move, and he also heard someone yell to "watch the block," just as Butler testified to. Although Hampton stated he did not strike Butler with the block, he knew that Butler "got hurt," prompting him to check on Butler's condition.

Because it was faced with such "contradictory testimony," the court felt that it had to decide whether plaintiff's version was trustworthy. The only plausibly contradictory testimony was Hampton's and even his version of the event was equivocal.

The trial court found it "*important* to note that the plaintiff did not connect [his] condition to any incident on the purse boat or to any accident." (Emphasis supplied). The record again does not substantiate this "important" finding:

> THE COURT: It (the power block) swings pretty violently when . . .

THE WITNESS (MASON): Yeah, at times or, you know, when it's rough if you've got any slack in it, it will, yeah.

THE COURT: When you got word that Mr. Butler was in the hold of the boat, was that after the set was complete?

THE WITNESS: After the set was complete, yeah.

THE COURT: And you visited with him down in the hold?

THE WITNESS: Yes.

THE COURT: Did he say he had gotten hit in the head by the block?

THE WITNESS: He told me he got hit.

THE COURT: By the block? I mean . . .

THE WITNESS: Yeah, block.

Captain Mason filed an accident report, as the trial court found. Yet, Leonard Nunez, the insurance claims specialist for Zapata, and Richard Brunner, its corporate risk manager, denied that any such report had been filed or that an accident of any sort had occurred.

The lower court found Butler's credibility to be lacking because he: (1) admitted making false statements in his job application relating to previous loss time accidents; (2) intentionally failed to mention an automobile accident; (3) does not file income tax returns; (4) went to an attorney first, rather than a doctor; and, (5) failed to disclose significant events in his past which would impact upon his current medical condition. These bases for a complete obliteration of plaintiff's credibility are

overemphasized and unrelated to the events surrounding the accident, especially when the record is viewed in its entirety.

The record contains additional ample objective and documentary evidence to sufficiently overcome the trial court's lack of credibility findings and to support a reversal.

Dr. Frank Robbins was plaintiff's treating physician who examined Butler two days after the occurrence. Butler had a 50% decreased range of motion in his neck. An x-ray of the cervical area revealed an angulation at the C5-C6 disc level. An angulation, explained Dr. Robbins, is a break in the normal curvature of the vertebrae and is evidence of trauma. It does not occur naturally. Furthermore, the plaintiff's injury was recent. Dr. Robbins opined that Butler could not have worked on the M/V Oyster Bayou with his injury, i.e., a herniated intervertebral disc.

Butler received therapy treatments on April 27, 28 and May 1 and 2, 1989. Dr. Robbins saw Butler on a regular basis through at least January 3, 1990 at which time, he felt, Butler was still unable to work. In August, 1989, Butler continued to complain of pain in his leg. Because of the pain and plaintiff's failure to respond to conservative treatment, Dr. Robbins felt an MRI was essential. An MRI was finally done on August 21, 1990. It revealed what is commonly known as a "slipped disc" which causes a compression of the spinal cord. This compression can cause symptoms in the lower extremities similar to those experienced by Butler.

Dr. Ariel Bar-Sela of the Houston Pain Center corroborated Dr. Robbins's diagnosis of a C-6 radiculopathy caused by a disc injury.

Moreover, Dr. Robbins examined x-rays of Butler's cervical area in 1987 taken as a result of an automobile accident and compared them to x-rays taken after this accident. The 1987 x-rays were normal along with a cat scan of the C-5 and C-6 areas. However, there were identifiable differences between the 1987 and 1989 post-accident x-rays.

Dr. Robbins concluded that based on Butler's history and having examined him two days post-accident, the impact of the power block was the cause of Butler's condition. He further felt that Butler was not malingering. The clinical examinations, x-rays, and MRI results were all consistent with the trauma described by Butler.

Dr. Dale Bernauer, an orthopedist, who treated Butler for a 1987 cervical injury confirmed Dr. Robbins's analysis of Butler's 1987 injury. The neurological examinations in 1987 were normal, the cervical strain sustained in 1987 was self-limiting in nature, and the CT scans of the cervical areas near C-6 and C-7 were essentially normal. Furthermore, the disc herniation in 1989 at C-5 and C-6 would *not* be a natural progression from the 1987 injury and would necessarily result from an intervening cause.

Dr. Cecil Clark performed a pre-employment physical examination on Butler on behalf of Zapata on February 23, 1989. No problems were noted. The report indicated a "normal spine." The record lacks any evidence to show an injury between February 23, 1989 and the date of the accident. We have to assume that Butler,

therefore, was in good health on April 24, 1989. If, after the incident, Butler had a disabling injury and there is a reasonable possibility that the incident caused the disabling injury, as we so find, then there is a legal presumption that the incident caused the injury. *Lucas v. Insurance Company of North America*, 342 So.2d 591 (La. 1977); *Heath v. Northgate Mall, Inc.*, 398 So.2d 132, 134 (La. App. 3d Cir. 1981). That legal presumption exists in the case *sub judice*. The defendant presented no evidence to rebut this legal presumption. The trial judge's failure to recognize and apply this presumption is an error of law.

Dr. William Foster, a neurosurgeon, examined Butler on May 4, 1989, one week after the accident. Butler had "marked paraspinous muscle spasm in the neck." He felt that the spasm was related to the recent injury of Butler. He exhibited a past concussion syndrome, cerebral concussion, and a severe cervical straining injury. Dr. Foster could not completely exclude a herniated cervical disc. He recommended one month of therapy and testified that his findings were consistent with involvement in some type of *recent* trauma.

At the request of Zapata, Butler was examined on July 23, 1990 by Dr. Gerald Litel, a neurosurgeon. His deposition testimony indicated that Butler's disc herniation occurred between December 16, 1987 and August 21, 1990 and that a blow to the head by a power block can cause a herniated disc. In his report to the attorney for Zapata, Dr. Litel specifically noted the appearance of a cervical strain and "complaints suggestive of a radiculopathy" which is a pinched nerve. Interestingly enough, Dr. Litel's observations mirrored those of Dr. Robbins, plaintiff's treating physician, and Dr. Bar-Sela.

Dr. Litel went on to say "I do believe this man sustained a significant blow to his head and has had a post-concussive syndrome."

Zapata's approach and responses to the plaintiff's allegations of injury were not models of consistency. In fact, their justifications and arguments were often disingenuous. Leonard Nunez, for example, testified that he received the first notice of an accident and injury on May 11, 1989 when an attorney for Butler wrote to him. He then assigned Jody Olsen to begin an investigation. Richard Brunner, Zapata's risk manager, testified that statements of potential witnesses and crewmen were taken *after* Butler spoke with a Zapata official in May, 1989. However, the record is clear that fourteen statements were taken by Ms. Olsen on April 26, 1989, *two days after the incident* which is the subject of this lawsuit. The testimony of Zapata officials has to be viewed with great suspicion under these circumstances. It borders on the incredulous to assume a position of ignorance with respect to an incident on which an investigation was ordered and conducted two days following the incident and then state that knowledge of the occurrence was *first* acquired some two weeks *after* the accident and investigation.

Although it is uncontroverted that Zapata was busy conducting an investigation two days following the accident and was placed on notice of an accident through numerous letters and medical reports received from Butler's attorneys, Zapata asserted in its answers to certain interrogatories *on February 1, 1990* that it had no reason to believe Butler was injured, except for his own assertions, had no knowledge of Butler's injuries, and did not have

an accident report. Of course, Zapata's own captain testified that he submitted a report on Butler's accident.

Given the circumstances enumerated above, this court is left with the unmistakable belief that an accident occurred on April 24, 1989 which injured John Butler. The trial court was manifestly erroneous to find otherwise.

NEGLIGENCE OF ZAPATA

Our jurisprudence holds that a seaman such as John Butler has a "featherlight" burden of proof in a civil action, *Osorio v. Waterman Steamship Corporation*, 557 So.2d 999 (La. App. 4th Cir.), *writ denied*, 561 So.2d 99 (1990), and that the "slightest negligence" is sufficient to sustain Jones Act liability. *Reed v. Seacoast Products, Inc.*, 458 So.2d 971 (La. App. 3d Cir. 1984). The record amply establishes that Zapata was negligent in allowing Butler to be struck with a power block being operated by a crewman, Aldoise "Cookie" Hampton, who was inexperienced in the operation of this hydraulically powered equipment. As noted elsewhere in this opinion, Hampton was a cook who was assigned to operate the power block which, according to Captain Mason, was difficult to control.

Because the trial court exonerated Zapata from all liability and this court has imposed liability because of Zapata's negligence, we shall next consider the award of damages after disposing of the issue of the propriety of granting Zapata's motion for involuntary dismissal on the unseaworthiness claim.

UNSEAWORTHINESS

The trial court was correct in dismissing Butler's claim of the unseaworthiness of the M/V Oyster Bayou. We, therefore, affirm.

Article 1672(B) of the Code of Civil Procedure states that:

* * *

> (B) In an action tried by the court without a jury, after the plaintiff has completed the presentation of his evidence, any party, without waiving his right to offer evidence, in the event the motion is not granted, may move for a dismissal of the action as to him on the ground that upon the facts and law, the plaintiff has shown no right to relief. The court may then determine the facts and render judgment against the plaintiff and in favor of the moving party or may decline to render any judgment until the close of all the evidence.

The trial court is not required to view the evidence in the light most favorable to the plaintiff. It may weigh and evaluate all the evidence presented up to that point and order a dismissal if the plaintiff has failed to establish his claim by a preponderance of the evidence. *Shafer v. State of Louisiana, Through DOTD*, 590 So.2d 639 (La. App. 3d Cir. 1991).

The power block operator, Hampton, testified that the block was operating normally and was not malfunctioning. The fact that Captain Mason testified about the difficulty of controlling it is not synonymous with a malfunction which would make it unseaworthy. There is

nothing in the record which suggests that the vessel and its gear and appurtenances were unsafe or unfit for their intended uses, nor is there any indication that a defective power block was the proximate cause of the accident. See, e.g., *Reed v. Seacoast Products, Inc., supra.*

MAINTENANCE AND CURE

It is well established that:

> When a seaman becomes ill or injured while in the service of his ship, the ship owner must pay him maintenance and cure, whether or not the ship owner was at fault or the ship unseaworthy . . . this obligation includes paying a subsistence allowance, reimbursing medical expenses actually incurred, and taking all reasonable steps to insure that the seaman receives proper care and treatment. (Citation omitted).
>
> Maintenance and cure is designed to provide a seaman with food and lodging when he becomes sick or injured in the ship's service; and it extends during the period when he is incapacitated to do a seaman's work and continues until he reaches maximum medical recovery. (Citation omitted).
>
> A ship owner who arbitrarily and capriciously denies maintenance and cure to an injured seaman is liable to him for punitive damages and attorney's fees. (Citation omitted).

Porche v. Maritime Overseas Corporation, 550 So.2d 278, 280 (La. App. 4th Cir. 1989).

We have previously determined that an accident occurred and Zapata Haynie Corporation was negligent

in causing the accident and resultant injuries. Zapata, therefore, had an obligation to provide maintenance and cure to Butler. Maintenance and cure extends to the time an injured seaman reaches maximum medical recovery. Maximum medical recovery

> . . . is achieved when it appears probable that further treatment will result in no *betterment* of the seaman's condition . . . Thus, where it appears that the seaman's condition is incurable, or that future medical treatment will merely relieve pain and suffering but not otherwise improve the seaman's physical condition, it is proper to declare that the point of maximum cure has been achieved.

Pelotto v. L & N Towing Company, 604 F.2d 396, 400 (5th Cir. 1979). (Emphasis in original). *Reed v. Seacoast Products, Inc., supra* at 978.

The plaintiff's exhibit on medical bills in the record reflects total medical bills through trial of $2,390.00. Plaintiff, John Butler, is entitled to recover this amount from Zapata, his former employer.

The record is unclear on when the plaintiff will reach maximum medical recovery. Dr. Robbins testified that Butler will need disc surgery. This procedure has not been accomplished so it is impossible to predict when maximum medical recovery will be reached. Nonetheless, "ambiguities or doubts in the application of the law of maintenance and cure are resolved in favor of the seaman." *Porche v. Maritime Overseas Corporation, supra* at 280. Zapata paid maintenance benefits to Butler beginning in December 1990 after the medical depositions were taken at the rate of $15.00 per day from December 3, 1990

to December 23, 1990. The benefits were terminated after this date. Dr. Charles Bettinger, the economist employed by the plaintiff, testified that $25.00 per day for room and board was a reasonable estimation for maintenance. This evidence went unrebutted. The plaintiff, therefore, is entitled to the sum of $25.00 per day for maintenance from the date of the accident, April 24, 1989, until he reaches maximum medical recovery. Zapata is to be given credit for the maintenance it paid in the sum of $315.00.

PUNITIVE DAMAGES AND ATTORNEY FEES

The court is aware of *Gray v. Texaco, Inc.*, 610 So.2d 1090 (La. App. 3d Cir. 1992), *writ denied*, 616 So.2d 686 (1993) in which a different panel of this court held that punitive damages were not available on a maintenance and cure claim following *Miles v. APEX Marine Corporation*, 498 U.S. 19, 111 S.Ct. 317 (1990). This panel respectfully disagrees with *Gray v. Texaco* to the extent it declined to award punitive damages on a maintenance and cure claim.

Miles v. APEX dealt with non-compensatory damages to an injured claimant. Punitive damages are also non-compensatory but serve a completely different purpose. As opposed to making a claimant whole, punitive damages are meant to penalize a recalcitrant employer for its egregious conduct and deter that employer from future illicit behavior. Its purposes, therefore, are wholly different from the non-compensatory damages to which *Miles v. APEX* referred. While we respect the position of our colleagues in *Gray v. Texaco*, we think the better position is that which is taken in *Ortega v. Oceantrawl, Inc.*, 822

F.Supp. 621 (D. Alaska 1992); *Mistich v. Pipelines, Inc.*, 609 So.2d 921 (La. App. 4th Cir. 1992), *writ denied*, 613 So.2d 996 (1993); *Thurman v. Patton-Tully Transportation Company*, 619 So.2d 879 (La. App. 3d Cir. 1993); *Duplantis v. Texaco, Inc.*, 771 F.Supp. 787 (E.D. La. 1991); *Reed v. Seacoast Products, Inc., supra.* Punitive damages are available under a Jones Act claim for negligence and a claim for the arbitrary denial of maintenance and cure to an injured seaman.

When is a defendant's conduct willful, arbitrary, and capricious so that punitive damages may be awarded? Punitive damages are merited for: 1) laxness in investigating a claim that would have been found to have merit; 2) failure to reinstate benefits after diagnosis of an ailment previously not determined medically; 3) reckless indifference; and, 4) willful, wanton, persistent, callous, or recalcitrant conduct. *Reed v. Seacoast Products, Inc., supra; Porche v. Maritime Overseas Corporation, supra; Holmes v. J. Ray McDermott & Company, Inc.*, 734 F.2d 1110 (5th Cir. 1984).

While we find Zapata's conduct to be repugnant and reprehensible in many instances, the record overall reflects Zapata's arguably reasonable, albeit incorrect, belief that an injury-causing accident had not occurred. Its erroneous evaluation of the factual circumstances does not elevate its conduct to the wantonness, recklessness, laxness, or callousness which would merit the imposition of punitive damages and attorney fees. We, therefore, decline to award these damages.

QUANTUM

Butler was examined by several physicians whose cumulative opinions indicate a herniation at the C-5 and C-6 cervical areas. Since he is of limited financial resources and because Zapata refused to pay for the medical expenses, he has been unable to receive extended medical care. Dr. Robbins unequivocally testified that disc surgery is necessary. This court will now proceed to consider various items of damages in its assessment.

A. Special Damages

Dr. Robbins testified that the cost of hospitalization for disc surgery will approximate $10,000.00 to $12,000.00 along with a surgical fee of $4,000.00 to $5,000.00. The court will, therefore, award $17,000.00 for future medical expenses.

Based on a future work expectancy of 11.7 years, Dr. Charles Bettinger, plaintiff's economist, tabulated Butler's loss of future earning capacity at $217,008.00 discounted to present value. Butler's loss of past earning capacity was tabulated at $39,460.00. His total past and present loss of earning capacity is, therefore, $256,468.00 based on 11.7 years of work expectancy with earnings tabulated at $13,000.00 per year as a fisherman for six months and $6.25 per hour for the remainder of that year.[1] Added to this figure is a minimum wage benefit

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[1] Aldoise Hampton testified that, on the average, a fisherman would earn $13,000.00 for a six month fishing season. Butler testified that he would earn $6.25 per hour "fairly regularly" working as a house painter, and Charles Stevens, for

package calculated at 15% or $38,202.00. His loss of past and future earning capacity totals $294,670.00. Dr. Bettinger's calculations are further supported by Dr. Robbins's testimony that the prognosis for Butler returning to any kind of manual labor is poor.

The court has considered Dr. Bettinger's calculation of $25.00 per day for room and board from the date of the accident to the date of trial and the future loss of room and board. However, we decline to award this amount as it has already been awarded as a maintenance benefit and since it is impossible to determine when Butler will achieve maximum recovery.

Furthermore, past medical bills of $2,390.00 will not be awarded as this amount has already been awarded in cure. Because cure is plaintiff's recovery of medical expenses, this amount will not be awarded as past medical expenses. To do so would amount to double recovery. See, *Reed v. Seacoast Products, Inc., supra.*

B. General Damages

Butler testified that since the accident, he has had to undergo the embarrassment of receiving state welfare assistance to support his family. It is impossible, he testified, to perform some of the odd jobs he was accustomed to performing such as painting his house, picking up the garbage, or even cutting his yard. Moreover, he cannot

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whom Butler worked as a handyman for twelve to thirteen years, stated that Butler would earn $100.00 per day when he worked. Since the accident, he could no longer perform those duties for Stevens.

attend social functions such as french dances with his wife. He cannot afford medical treatment. He is unable to have the surgery performed as recommended by Dr. Robbins and is unable to see Dr. Moore, a neurosurgeon, as he wishes because of his financial inability. As previously noted, Dr. Robbins testified that the prognosis of Butler returning to any kind of manual labor is poor.

Considering all of these factors, we award Butler $100,000.00 for past pain and suffering and $150,000.00 for future pain and suffering for a total of $250,000.00 in general damages.

SUMMARY OF DAMAGES

Maintenance – $25.00 per day from the date of the accident to plaintiff's maximum medical recovery.

Cure	$ 2,390.00
Future Medical Expenses	$ 17,000.00
Loss of past and future earning capacity	$294,670.00
Past pain and suffering	$100,000.00
Future pain and suffering	$150,000.00
TOTAL (Excluding Maintenance)	$564,060.00

Pre-judgment interest is awarded on all items of damages except future non-economic general damage of $150,000.00. *McFarland v. Justiss Oil Co.*, 526 So.2d 1206 (La. App. 3d Cir. 1988); *Gray v. Texaco, Inc., supra.*

CONCLUSION

For the reasons given above, the judgment of the trial court is affirmed with respect to its dismissal of the plaintiff's unseaworthiness claim, but reversed with respect to its dismissal of plaintiff's Jones Act claim of negligence.

Judgment is hereby rendered awarding maintenance at the rate of $25.00 per day from the date of the accident, April 24, 1989, until plaintiff reaches the point of maximum medical benefit. Additionally, judgment is awarded to plaintiff in the following amounts: cure – $2,390.00; future medical expenses – $17,000.00; loss of past and future earning capacity – $294,670.00; past pain and suffering – $100,000.00; future pain and suffering – $150,000.00.

Legal interest is awarded on $150,000.00 from the date of this judgment and on $414,060.00 from the date of the accident, April 24, 1989, until paid.

All costs of the trial court and this appeal are assessed against defendant-appellee, Zapata Haynie Corporation.

AFFIRMED IN PART, REVERSED IN PART AND RENDERED.

Domengeaux, C.J., dissents for the written reasons assigned by Stoker, J.

Stoker, J., dissents and assigns written reasons Saunders, J., dissents in part, concurs in part and assigns reasons.

NO. 92-71

COURT OF APPEAL, THIRD CIRCUIT

STATE OF LOUISIANA

JOHN WILLIAM BUTLER

Plaintiff - Appellant

vs.

ZAPATA HAYNIE CORPORATION

Defendant - Appellee

SAUNDERS, J., Concurring in part and dissenting in part,

I have reviewed the entire record in this case and do not find any evidence to support the proposition that the plaintiff, John Butler, was not struck by the boom of the M/V Oyster Bayou. Accordingly, I agree with the author of the majority opinion that we must reverse the trial court's finding that no accident occurred inasmuch as the record conclusively shows that there was an accident. The court below, having found that no accident occurred, does not address the issues of causal connection, extent of injuries, entitlement to maintenance and cure, entitlement to punitive damages and quantum of damages. With regard to these issues, I agree with the conclusions of the lead author, including the view expressed in the majority opinion that punitive damages may be available in a maintenance and cure claim, although they are not warranted in the present claim.

I do not agree, however, with the view expressed in the majority opinion with reference to the quantum of loss earning capacity which is assessed at $294,670.00. I concede that had the court below awarded this quantum

for loss earning capacity, there is evidence to support such a funding. Reviewing the record as a whole, however, and considering the plaintiff's sporadic work history, his failure to file income tax returns, and his long absence from the seaman's calling, I feel that an award for this item of $150,000.00 would be more appropriate and more in keeping with the evidence of record.

Accordingly, while I agree with the majority in all other respects, I disagree with the award as to quantum of loss earning capacity.

NUMBER 92-71
COURT OF APPEAL, THIRD CIRCUIT
STATE OF LOUISIANA

JOHN WILLIAM BUTLER
Plaintiff – Appellee

VERSUS

ZAPATA HAYNIE CORPORATION
Defendant – Appellant

STOKER*, J., dissenting.

With respect I dissent from the majority's reversal of the trial court's judgment. I dissent on the ground that the trial court's findings of fact that no accident happened were reasonably supported. This is particularly so because his credibility evaluation of the witnesses was quite reasonably based, if not eminently correct.

STANDARD OF APPELLATE REVIEW

The majority opinion in this case is a clear manifesto by the majority setting forth its intention not to be governed by the manifest error-clearly wrong standard for appellate review established by the Louisiana Supreme Court. It is a patent challenge to the authority of the supreme court to jurisprudentially establish the rule. Without the jurisprudentially established rule limiting the

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*Retired Judge Jimmy M. Stoker participated in this case prior to his retirement from the Court of Appeal, Third Circuit, State of Louisiana. He continued to participate in the case after his retirement through assignment as a judge *ad hoc* by the Louisiana Supreme Court.

constitutional authority of the courts of appeal of Louisiana to review facts as well as law, the appellate courts would apparently have wide open authority to assess anew the evidence and testimony in trial records and cavalierly make their own findings of fact regardless of the findings of fact made by the trier of fact. See footnote two in *Rosell v. ESCO,* 549 So.2d 840 (La. 1989).

However, in the jurisprudentially developed rule the Louisiana Supreme Court has made it quite clear that the constitutional grant does not extend to the point of granting courts of appeal authority to reconsider the facts on a *de novo* basis. In *Rosell* the supreme court stated: "[i]n applying the manifestly erroneous-clearly wrong standard to the findings below, appellate courts must constantly have in mind that their initial review function is not to decide factual issues *de novo." Rosell,* 549 So.2d at 844. (Citations and footnote omitted.)

Deciding factual issues *de novo* is exactly what the majority has done in this case, and in so doing it defies the supreme court's clear injunction not to do so.

The Louisiana Supreme Court has addressed itself before and after *Rosell* to the policy reasons for the rule and to setting forth interpretations in order that appellate courts may properly apply the rule. The majority itself cites *Stobart v. State Through DOTD,* 617 So.2d 880 (La. 1993) as a recent restatement of the rule. In both *Rosell* and *Stobart* the supreme court found appellate courts erroneously reversed trial court findings and judgments because they assigned factual rather than legal grounds for reversal. *Rosell,* 549 So.2d at 843 and *Stobart,* 617 So.2d at 881. Assigning factual rather than legal grounds for

reversing the trial judge's findings of fact and judgment is exactly what the majority has done in this case.

The question here is not whether the majority's view of the facts (including its view on the credibility issue) is more probable or more correct than that of the trial judge. The question is whether the trial judge's view of the facts is reasonably based. In that connection the Louisiana Supreme Court has said that when findings of fact are based on credibility evaluations, such findings of fact can virtually never be manifestly erroneous or clearly wrong. *Rosell,* 549 So.2d at 845. Moreover, the supreme court has also said that the manifest error-clearly wrong rule is not based merely on the circumstance that the trier of fact hears the testimony and views the evidence personally. It is also based on an allocation of functions between trial and appellate courts. *Canter v. Koehring Co.,* 283 So.2d 716 (La. 1973). That in part is the basis for the supreme court's injunction that appellate courts shall not substitute their opinions as to what they consider the facts to be for those of triers of fact – even if the appellate court would have decided the case differently had it heard the case initially as the trier of fact.

In referring to *Stobart* the majority quotes from the opinion to some extent, but (without so indicating) omits highly significant language. After quoting the supreme court's injunction that appellate courts must review the record in its entirety and not merely examine the record to see if there is some evidence to support the findings of the trier of fact, the following statement (omitted by the majority opinion) appears:

> "Nevertheless, the issue to be resolved by a reviewing court is not whether the trier of fact was right or wrong, but whether the factfinder's conclusion was a reasonable one." *Stobart*, 617 So.2d at 882. (Citations omitted.)

Moreover, in quoting from *Stobart*, the majority stops short of quoting the following significant language:

> "Nonetheless, this Court has emphasized that 'the reviewing court must always keep in mind that "if the trial court or jury's findings are reasonable in light of the record reviewed in its entirety, the court of appeal may not reverse, even if convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." ' (Citations omitted.)
>
> "This court has recognized that '[t]he reason for this well-settled principle of review is based not only upon the trial court's better capacity to evaluate live witnesses (as compared with the appellate court's access only to a cold record), but also upon the proper allocation of trial and appellate functions between the respective courts.' *Canter v. Koehring Co.*, 283 So.2d 716 (La. 1973). *Thus where two permissible views of the evidence exist, the factfinder's choice between them cannot be manifestly erroneous or clearly wrong. Id.*" *Stobart*, 617 So.2d at 882-883. (Emphasis added.)

In *Rosell*, regarding the deference to be accorded credibility evaluations by a trier of fact, the supreme court said:

> "When findings are based on determinations regarding the credibility of witnesses, the manifest error-clearly wrong standard demands great deference to the trier of fact's findings; for

> only the factfinder can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding and belief in what is said. (Citations omitted.) Where documents or objective evidence so contradict the witness's story, or the story itself is so internally inconsistent or implausible on its face, that a reasonable fact finder would not credit the witness's story, the court of appeal may well find manifest error or clear wrongness even in a finding purportedly based upon a credibility determination. (Citations omitted.) But where such factors are not present, and a factfinder's finding is based on its decision to credit the testimony of one of two or more witnesses, that finding can virtually never be manifestly erroneous or clearly wrong. (Citations omitted.) *Rosell*, 549 So.2d at 844-845.

In an attempt to water down and lessen the binding effect of the manifest error-clearly wrong standard of review set forth in *Rosell* and *Stobart*, the majority makes reference to the Louisiana Supreme Court case of *Mart v. Hill*, 505 So.2d 1120 (La. 1987) through a quotation from *Dugas v. Fontenot Motors, Inc.*, 510 So.2d 1374 (La. App. 3d Cir. 1987). Both cases predate the decisions in *Rosell* and *Stobart*. However, chronology is not the factor which distinguishes the cases. Even before *Mart v. Hill*, the manifest error-clearly wrong rule was embodied in *Arceneaux v. Domingue*, 365 So.2d 1330, 1333 (La. 1978) which was a reinterpretation of *Canter v. Koehring Co.*, supra. See *Rosell*, 549 So.2d at 844.

The majority states in its opinion that certain principles set forth in *Mart*, as paraphrased in this court's *Dugas* case, should be balanced against the directions set

forth in *Rosell* and *Stobart*. *Dugas* paraphrases from *Mart* as follows:

> "The principles of appellate review do not require an appellate court to affirm the trier of fact's refusal to accept as credible uncontradicted testimony or greatly preponderant objectively-corroborated testimony where the record indicates no sound reason for its rejection and where the factual finding itself has been reached by overlooking applicable legal principles. *Mart v. Hill*, 505 So.2d 1120 (La.1987)."

Dugas, 510 So.2d at 1376.

The majority's reliance on the quoted statement virtually accuses the supreme court of not meaning what it says and of sending mixed and confusing signals. *Mart v. Hill* is not intended as a license to disregard the manifest error-clearly wrong standard anytime an appellate majority wishes to do so. Both *Mart* and *Dugas* must be read in context. As the quotation set forth above shows, the supreme court's pronouncement in *Mart* was directed toward a "trier of fact's refusal to accept as credible *uncontradicted* testimony or greatly preponderant *objectively-corroborated* testimony." Mart, 505 So.2d at 1127. (Emphasis added.) The case before us is not a case involving uncontradicted testimony. The diametrically opposed testimony in this case required that the trial judge make a credibility evaluation as to whether or not an accident actually happened. Also, there is no "greatly preponderant" objective evidence which corroborates plaintiff's claim that he sustained an injury-producing blow to his head – other than the medical testimony, and, as the trial

judge observed, the medical testimony is questionable on this point.

In *Mart v. Hill,* the supreme court was presented with a case in which the facts were relatively clear. An accident happened. The concern of the supreme court involved the correctness of the lower courts' allocation of fault between the plaintiff and the defendant (a highly subjective matter) and the length of plaintiff's disability and consequent medical expenses beyond a certain date. The latter issue simply involved the supreme court's different interpretation of the medical evidence about which there was no dispute. I submit, therefore, that the statement in *Mart* relied upon by the majority must be read in context. It has no application to *disputed* facts. *Mart* is distinguishable from the case before us.

What I have stated above about *Mart* also applies to *Dugas v. Fontenot Motors, Inc., Dugas* was a worker's compensation case in which the occurrence of an injury-producing accident on the job depended on the plaintiff's sole testimony. However, there was no testimony or evidence which contradicted the plaintiff's word. The court of appeal found corroboration for plaintiff's claim that he had an accident, and the court of appeal reversed the trial court's dismissal of plaintiff's suit after plaintiff rested his case. The case was remanded for further proceedings.

I respectfully submit that the majority's reliance on *Mart* and *Dugas* is entirely misplaced. The pronouncements in those cases are based on situations quite distinct from the situation before us. The situation before us is analogous to the situations in *Rosell* and *Stobart.* In *Mart* and *Dugas* the given facts were undisputed. In *Rosell* and

Stobart the appellate courts simply made determinations of factual issues different from those of the triers of fact, that is, they made *de novo* determinations. That is what is proscribed by the manifest error-clearly wrong rule.

I further submit, respectfully, that if the majority's utilization of *Mart* and *Dugas* should be allowed to stand, then *Rosell* and *Stobart* would have no meaning. When it might please an appellate court majority, it could invoke *Mart* to cancel out *Rosell* and *Stobart*. The Louisiana Supreme Court laid down both sets of principles. Obviously, both must have validity and do not cross one another out. Thus, the principles apply to differing situations. They are not in conflict.

After reviewing the record in this case, and applying the principles discussed above, I find no basis for concluding that the trial judge's findings of fact are not reasonably based. Particularly, the trial judge's evaluation of the credibility of the witnesses is well supported in the record. This is especially so in view of the fact that the plaintiff's co-worker witnesses claimed that earlier statements made by them denying that an accident occurred were not true but were based on protecting an entitlement to bonuses based on the absence of injury-producing accidents during the fishing run. Consequently, I dissent from the majority's reversal of the trial court. The trial judge's rejection of the plaintiff's claim should not be reversed. In support of my views I think it is appropriate at this point that I set forth in full the written reasons for judgment of the trier of fact, the Honorable H. Ward Fontenot, the district judge who heard and decided the case in a bench trial.

TRIAL JUDGE'S REASONS FOR JUDGMENT

The following are Judge Fontenot's reasons:

"The plaintiff, John William Butler, claims that he suffered an injury on April 24, 1989 While working as a seaman on a vessel owned by the defendant, Zapata Haynie. He claims a residual physical disability as a result of the injury.

"What is certain is that on April 24, 1989, plaintiff was a member of the crew of the vessel, M/V Oyster Bayou. The vessel was engaged in catching menhaden, a fish widely referred to as a 'pogy', in the Gulf of Mexico. The incident alleged by the plaintiff occurred on a 'purse boat.' This is a powered launch carried by the main vessel, called the 'steamer.' A steamer uses two purse boats in the fishing operation.

"The purse boats are used to draw out a large net and to encircle the schools of menhaden. Each purse boat has a power block mounted on a swivel boom. The block is used to reel in the net. The power block can be moved vertically and horizontally by an operator in the bow of the purse boat. Plaintiff's testimony was that the swinging of the boom resulted in a blow to his head which caused his disabling injury. Defendants dispute that any such incident took place.

"The bulk of the evidence in this trial turned on the events subsequent to April 24, 1989 but the first inquiry of the court must be whether or not the plaintiff can sustain his burden regarding the occurrence of an accident on April 24, 1989.

"The seaman is said to have a 'featherlight' burden in a civil action. But though his burden requires a showing of only the slightest negligence, he must still prove the accident and its causitive[sic] link with an injury. Osorio v. Waterman S.S. Corp., 557 So.2d 999 (La. App. 4th Cir. 1990). Miller v. Lykes Brothers-Ripple SS Co. Inc., 98 F2d 185 (5th Cir. 1938). An analysis of the facts follows.

"Plaintiff's version of events rest[sic] solely upon his testimony and that of two other crew members of the M/V Oyster Bayou, namely Oscar Dudley and George LeMelle. It was Butler's testimony that while doing his work in the purse boat as a cork puller, the power block was swung by the operator and struck him in the head. The impact broke the hard hat which he wore and knocked him unconscious. He then awoke in the hole of the ship where he was receiving medical attention. His injuries were disabling and he never returned to work as a fisherman because of the accident.

"Plaintiff's first witness on this issue was Oscar Dudley who testified that he remembered Butler being hit and being knocked unconscious. He further testified that the crew had to stop work when Butler got hit so that the injured seaman could be carried below deck.

"George LeMelle was compelled to testify by the court. He had also been a member of the crew and he testified in open court to substantially the same facts given by Dudley. He remembered the plaintiff receiving a serious blow to the head and the work stoppage that followed.

"The versions recited above are directly contradicted by Bruce Mason, who was the captain on the M/V Oyster

Bayou on April 24, 1989 and by Aldoise Hampton, the operator of the power block on the purse boat the day of the alleged incident.

"It was Captain Mason's testimony that, from his vantage point in the other purse boat, he witnessed the power block coming into contact with the edge of plaintiff's helmet but that there was no blow. He testified that the hat was not knocked off and the plaintiff was unaffected by it. He went on to testify that after the crew had returned to the steamer, he was told that plaintiff was ill below deck. Upon the captain's inquiry, the plaintiff told him that his head hurt and he had gas on his stomach and gas on his arm. It is important to note that the plaintiff did not connect this condition to any incident on the purse boat or to any accident. The plaintiff's ailments were treated with an antacid and aspirin.

"It was the captain's further testimony that upon reaching shore, Butler and the captain exchanged angry words about the performance of the crew. The conversation ended with plaintiff's quitting as a member of the crew. Later that evening, Butler returned and asked that an accident report be filed regarding a blow to his hard hat by the power block. Captain Mason initially refused, telling Butler that he was fabricating. Later the captain did file an accident report describing the accident as 'minor.'

"Aldoise Hampton was the ring setter on the purse boat occupied by the plaintiff. In his job duties, he occasionally was called upon to operate the power block and was doing so at the time that plaintiff alleges his accident. It was Hampton's testimony that he did not see anyone

get hit and no one was carried off of the purse boat. On cross examination, he admitted that from his position in the purse boat, some things could occur which would escape his attention but he testified that he would have noticed any interruption in the work and denied that any such interruption took place.

"Faced with such contradictory testimony, the court has had the task of deciding whether the testimony in support of plaintiff's position is sufficiently trustworthy.

"A review of the plaintiff's testimony, both in open court and through his earlier depositions, discloses him to be evasive and purposely vague. He admitted making false statements in his job application with the defendant herein relating to previous loss time accidents. He intentionally failed to mention an automobile accident, one he could hardly forget because he filed a lawsuit in connection therewith.

"Plaintiff does not file income tax returns. When questioned about his previous employment, both at trial and earlier, major discrepancies in his testimony are irreconciliable[sic] and too glaring to be inadvertent.

"He admitted in court that upon returning home after leaving the boat, he did not first go to a doctor for his injury but instead went to an attorney. When questioned about that suspicious development, he testified that he thought he was going to a doctor's office.

"The plaintiff's credibility is further eroded when the testimony of the various doctors is analyzed. Each time a history was given to a physician, it failed to adequately

disclose the significant events in plaintiff's past which would bear upon his current medical condition.

"The testimony of Oscar Dudley and Philip LeMelle also does not bear close scrutiny. Both of these witnesses gave statements on April 26, 1989, two days after the alleged incident, in which they gave versions of the incident which agreed with the testimony of Captain Mason and Hampton and refuted that of the plaintiff. The explanations given by both of these witnesses at trial for recanting their statements was the same: that a bonus was paid to boats for not having accidents and that they had lied in order to protect the bonus.

"This proffered justification for giving false testimony whenever convenient does not explain why LeMelle affirmed his initial statement with another statement as late as January of 1991, long after his incentive bonus was history.

"In Dudley's case he admitted that he was related by marriage to the plaintiff, was a close acquaintance and was accompanying the plaintiff back and forth to the courthouse each day. Furthermore, Dudley gave testimony about his own earnings as a fisherman which was found to be absolutely false.

"In summary, plaintiff's case must rest on his credibility and that of Dudley and LeMelle. The court concludes that their credibility is nonexistent. On the other hand, the testimony of Captain Mason and of Aldoise Hampton, neither of whom is still employed by Zapata Haynie, was not impeached and there was no effort to do so.

"In view of the above, it is the finding of the court that the plaintif [sic] has failed to prove the occurrence of an injury-causing accident while he was aboard defendant's vessel on April 24, 1989. Considering the above and foregoing, the plaintiff's petition is dismissed at his costs. The fees of the experts will be fixed by the court at the time that a formal judgment is presented reflecting these views which judgment will be signed upon presentation."

Upon careful review of the record, I can see no basis for disturbing the trial judge's resolution of the conflict in the testimony and his finding of fact that plaintiff "failed to prove the occurrence of an injury-causing accident while he was aboard defendant's vessel on April 24, 1989."

Judged against the record, the trial judge's conclusions are certainly reasonable. Reasonableness is the touchstone for determining whether an appellate court may disregard the conclusions of a trier of fact as to what the true facts may be.

In order to negate the testimony of Capt. Mason, counsel for plaintiff sought at trial to establish that there were two incidents in which the power block struck the plaintiff, that Capt. Mason saw only one of the events and he did not see the event which plaintiff claims resulted in an injury-producing accident. The record does not establish that there were two such events, but the majority opinion seizes upon the suggestion and innuendo that there were two events. The majority opinion appears to rest its discounting of Capt. Mason's testimony on the

two-event theory. However, the majority never points to any proof in the record that there were two such events.

My reading of Capt. Mason's testimony on pages 268 through 274 of the record indicates that he was present on his boat next to the mate boat during the entire time in which plaintiff allegedly experienced an injury-producing accident. Mason testified he saw plaintiff's hat get bumped but that plaintiff continued to work and finished the set. There was no interruption in the process in which the workers were engaged. To the contrary, plaintiff's witness, Oscar Dudley, testified (R. 505 and 506) that plaintiff was so injured by the blow to his head that it knocked his helmet off, knocked plaintiff so that "he just went that way" and "[w]e had to stop and went and try [sic] to get him on the big boat." Further, he said "the cook and them helped him down in the hold."

It would seem quite clear that if plaintiff Butler had been as immediately incapacitated by the blow as Dudley said he was, Capt. Mason could not have failed to notice it. The same observation applies to Aldoise Hampton, the operator of the power block who saw nothing like what Dudley described. When Capt. Mason went to check on Butler in the hold, he saw no evidence of injury (R. 274) despite the fact that Butler told Mason that he, Butler, had been hit in the head by the power block. (R. 273).

It is clear from the record that the two-accident or event theory was fully advanced in the trial court and considered by the trial judge. (See R. 266 and 267.) Because the trial judge accepted the testimony of Mason and Hampton over that of plaintiff and his witnesses, he clearly rejected the suggestion that Butler may have been

seriously injured in an accident Mason and Hampton did not see. Based on fair consideration of all of the testimony, this is an entirely reasonable resolution of the conflicting testimony. And, as I have continued to note in this dissent, if that resolution has a reasonable basis, the manifest error-clearly wrong rule requires that this court of appeal find that the trial court was not clearly wrong. The majority erred in doing so.

I will forego the temptation to pick the record to demonstrate the inconsistencies in the testimony of plaintiff's witnesses, nor will I dwell upon their claim that they gave false statements early on in order to obtain the bonus given for an accident-free expedition. The trial judge adequately covered these points. The trial judge also gave a reasonable explanation as to why he gave no probative weight to the medical testimony insofar as it purported to establish that plaintiff was injured in an accident on defendant's boat.

PLAINTIFF'S BURDEN OF PROOF

I digress at this point to briefly address plaintiff's contention that his burden of proof in this case is "featherlight" under federal maritime law. The trial court made brief reference to this contention in his reasons for judgment, but I add these observations to reinforce the total inapplicability of the "featherlight" burden of proof. Under federal jurisprudence, evidence of "the slightest negligence" is sufficient to sustain a finding under the Jones Act. *Osorio v. Waterman S.S. Corp.*, 557 So.2d 999 (La. App. 4th Cir.), writs denied, 561 So.2d 99 (La. 1990); *Reed v. Seacoast Products, Inc.*, 458 So.2d 971 (La. App. 3d

Cir. 1984). However, as the words "slightest negligence" imply, the concept applies to circumstances in which an injury-producing accident actually took place, and the question is whether that accident occurred because of negligence. In such cases maritime law tips the scales in favor of a seaman by requiring that the seaman establish only the "slightest negligence." Thus, proving that an injury-producing accident *actually occurred* is a necessary predicate to using the "slightest negligence" rule to establish that the accident resulted from negligence.

In the case before us, we should not reach the slightest negligence rule since the trial judge was not manifestly erroneous or clearly wrong in finding that an injury-producing accident did not in fact occur. Because there is no manifest or clear error in that finding, there is no reason to be concerned with the slightest negligence rule, and we should go no further and should affirm the trial court's findings.

FEDERAL AND STATE STANDARDS OF APPELLATE REVIEW OF FACTS

In briefing this case for this court, counsel have made references to the "clearly erroneous" standard of review set forth in Federal Rule of Civil Procedure 52(a). In my opinion reference to the federal standard for appellate review of factual issues is not necessary for several reasons. To begin with, the federal standard does not apply in a state proceeding to appellate review of factual determinations of a trial court. *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 712, 106 S.Ct. 1527, 1529, 89 L.Ed.2d 739 (1986). Based on *Icicle Seafoods, Inc.*, the Louisiana Supreme Court, in a per curiam opinion stated that "the

procedural law of Louisiana controls as to the scope of appellate review." *Daigle v. Coastal Marine, Inc.*, 488 So.2d 679, 682 (La. 1986). This Louisiana Supreme Court statement may be dicta. However, this court of appeal followed the pronouncement in *Icicle Seafoods, Inc.*, and *Daigle* and quoted from the former to hold that "the U.S. Supreme Court stated [in *Icicle Seafoods, Inc.*] that 'state courts are not required to apply Rule 52(a) – a rule of *federal* civil procedure – to their own appellate system for reviewing factual determinations of trial courts.' " *Hanks v. Barge Transport Co., Inc.*, 563 So.2d 1297, 1300 (La. App. 3d Cir.), writ denied, 569 So.2d 964 (La. 1990).

Finally, it would appear that the federal standard for appellate review of factual determinations is virtually identical with the Louisiana standard of *Rosell* and *Stobart*. In a per curiam opinion by Judges Politz, King and Smith of the U. S. Court of Appeals for the Fifth Circuit, the court used language which is almost a quotation from *Rosell*. *Schexnider v. McDermott International, Inc.*, 868 F.2d 717, 720 (5th Cir. 1989).[1]

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[1] In *Schexnider v. McDermott International, Inc.*, 868 F.2d 717, 720 (5th Cir. 1989), the U. S. Court of Appeals for the Fifth Circuit stated:

> "Determinations as to the credibility of witnesses are peculiarly within the province of the district court. Even if we were convinced, which we are not, that had we been sitting as the trier of fact, we would have weighed the evidence differently, our ability to reverse the district court's judgment on the basis that its findings of fact are clearly erroneous is extremely limited. As the Supreme Court said in *Anderson v. Bessemer City*, 470 U.S. 564, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985), when a trial judge's finding is based on his

Despite the holdings on this issue referred to above, the matter appears to be in some confusion in the courts of appeal in Louisiana. The Court of Appeal, Fifth Circuit, State of Louisiana, recently applied the state standard of *Rosell* in a Jones Act and general maritime suit. *Hae Woo Youn v. Maritime Overseas Corp.*, 605 So.2d 187 (La. App. 5th Cir. 1992).[2] After pointing out how emphatically the Louisiana Supreme Court had expressed itself in *Rosell* and subsequent cases, the fifth circuit then made reference to that circuit's earlier case of *Sutton v. Central Gulf Lines, Inc.*, 433 So.2d 888 (La. App. 5th Cir. 1983). In referring to *Sutton*, the fifth circuit appears to equate the federal rule to the Louisiana rule of *Rosell*; that is, the fifth circuit apparently felt that the rules are the same, or at least similar. With that I agree.

In *Sutton*, in discussing the applicable standard of review, the fifth circuit in 1983 appears to have felt it was bound by the federal rule as embodied in Federal Rule of Procedure, Rule 52(a). The fifth circuit set forth the pertinent portion of that rule in a footnote as follows:

> decision to credit the testimony of one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear error. *Id.* 470 U.S. at 575, 105 S.Ct. at 1513."

[2] In *Hae Woo Youn v. Maritime Overseas Corp.* the Louisiana Supreme Court denied a writ in 609 So.2d 240 (La. 1992), granted a writ in 609 So.2d 239 (La. 1992), and in an opinion at 623 So.2d 1257 (La. 1993) modified the court of appeal in part to reinstate the damages awarded by the trial court. See also cert. denied, 113 S.Ct. 2342 (1993).

"1. Fed.R.Civ.P. 52(a) provides, in pertinent part, as follows:

> '(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and *due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.*' (Emphasis added)"

433 So.2d at 891 n.1.

Under the case of *Hae Woo Youn*, the fifth circuit appears to hold that the *clearly erroneous* Rule of 52(a) is the same as the Louisiana manifestly erroneous-clearly wrong rule of *Rosell* and *Stobart* discussed earlier in this opinion.

Interestingly, the Louisiana Court of Appeal, Fourth Circuit, has taken contrary views within that circuit as to whether federal or state law governs the standard for appellate review of facts. *Young v. Armadores de Cabotaje, S.A.*, 617 So.2d 517 (La. App. 4th Cir.). writs denied, 625 So.2d 170 and 171 (La. 1993): *Forrest v. Waterman Steamship Corp.*, 617 So.2d 59 (La. App. 4th Cir.). writs denied, 619 So.2d 544 (La. 1993); *Osorio v. Waterman S.S. Corp.*, supra.

Forrest is a case much like the case before us. In *Forrest* the crucial issue was whether the plaintiff proved that his injury occurred on board one of the defendant's barges, and the issue turned on the credibility of the plaintiff. The Louisiana Court of Appeal, Fourth Circuit, ruled as follows:

> "Because plaintiff's claim is brought under the general maritime law of the United States, our standard of review in this case must correspond to that of a federal appellate court. *Guilbeau v. Calzada*, 240 So.2d 104 (La.App. 4th Cir.1970). Under federal law, the findings of the trial judge may not be disturbed on appeal unless they are clearly erroneous, and further, due regard shall be given to the opportunity of the trial judge to judge the credibility of witnesses. Fed.Rule Civ.Pro. 52(a); *Sutton v. Central Gulf Lines, Inc.*, 433 So.2d 888 (La.App. 5th Cir.1983).
>
> "In our view, the instant case turns on the credibility of the plaintiff because he is the only one who knows how the accident occurred. According to his Reasons for Judgment, the trial judge determined, based on the inconsistencies in the plaintiff's testimony and the evidence tending to discredit his story, that the plaintiff was not believable. He therefore concluded that the plaintiff had failed to prove by a preponderance of the evidence that his injury occurred aboard one of the LASH barges. We do not find this conclusion to be clearly erroneous in light of the total evidence presented, especially giving due deference to the trial judge as the judge of credibility.
>
> "Accordingly, for the reasons stated, we affirm the judgment of the trial court."

Forrest, 617 So. 2d at 61.

Thus, despite applying the federal standard, the court of appeal affirmed a judgment for the plaintiff.

In *Osorio* the fourth circuit considered it should review a Jones Act claim under the federal standards of review, although it noted that in *Daigle v. Coastal Marine, Inc.*, supra, the Louisiana Supreme Court had questioned the correctness of applying federal standards to any type of maritime case filed in state court. In *Young*, 617 So.2d at 525, the fourth circuit held that in maritime cases the state standard of appellate review applied, as follows:

> **"LIABILITY OF ARCASA**
>
> "ARCASA's primary assignment of error is that the evidence was insufficient to support a finding that it was negligent and that such negligence was a cause of plaintiff's injuries.
>
> "We first address the applicable standard of appellate review. Federal jurisdiction over 33 U.S.C.A. § 905(b) claims is based upon the general maritime law. 28 U.S.C.A. § 1333(a); *Russell v. Atlantic & Gulf Stevedores*, 625 F.2d 71 (5th Cir.1980). State courts have concurrent jurisdiction with federal courts to hear LHWCA cases by virtue of the 'saving to suitors' clause of 28 U.S.C.A. § 1333(1); *Bynum v. Patterson Truck Lines, Inc.*, 655 F.2d 643 (5th Cir.1981); *Allen v. Keeney*, 442 So.2d 1171 (La.App. 1st Cir.1983), *writ denied*, 445 So.2d 1232 (La.1984). State courts apply their own system for reviewing factual determinations of juries in general maritime law and LHWCA cases. *Simmons v. Hope Contractors, Inc.*, 517 So.2d 333 (La.App. 1st Cir.1987), *writ denied*, 518 So.2d 510 (La.1988).
>
> "The question of negligence in a maritime case is a question of fact for the jury. *Randolph v.*

Laeisz, 896 F.2d 964 (5th Cir.1990). Louisiana appellate jurisdiction extends to review of questions of law and fact in civil cases. La. Const. art. 5, §§ 5 and 10. On appellate review, a court may not disturb the factual findings of a judge or jury unless those findings are clearly wrong. *Rosell v. ESCO*, 549 So.2d 840 (La.1989); *Arceneaux v. Domingue*, 365 So.2d 1330 (La. 1978); *Canter v. Koehring, Co.*, 283 So.2d 716 (La. 1973)."

PLAINTIFF'S CONTENTIONS REGARDING TRIAL COURT'S CREDIBILITY DETERMINATION

In a reply brief filed on behalf of plaintiff we are urged to consider that *Rosell* itself does not completely foreclose an appellate court of this state from reversing a trier of fact on a finding of fact. Counsel cites the case of *Elliott v. U.S. Fidelity & Guar. Co.*, 568 So.2d 155 (La. App. 2d Cir. 1990). This position is much the same as that set forth by the majority opinion in this case in which the majority relies on the cases of *Mart v. Hill*, supra, and *Dugas v. Fontenot Motors, Inc.*, supra. My reply to this contention of plaintiff is the same as that addressed to *Mart* and *Dugas*. However as *Elliott* is readily distinguishable, I will address plaintiff's contention in this regard.

In *Elliott* the court of appeal reversed a trial court's finding of fact and a judgment in favor of a plaintiff in a personal injury suit. The court of appeal squared its decision to reverse in the following comments:

> "While we recognize that the trial court's factual findings and credibility determinations are due great weight, we are not required to accept its unreasoned and unreasonable conclusions as to either. *Wilson v. Jacobs*, 438 So.2d 1119 (La.App. 2d Cir.1983), writ denied, 443 So.2d

> 586 (La.1983). In Louisiana, courts of appeal have a duty to fully and completely review not only the law applied by trial courts but also the factual determinations made therein. La. Const. Article 5 § 10; *Arceneaux v. Domingue*, 365 So.2d 1330 (La.1978). The supreme court has recently reiterated that a reviewing court may overturn a factual finding grounded on a credibility call if the objective evidence so contradicts the witnesses' story or the story itself is so internally inconsistent or implausible on its face that a reasonable fact-finder would not credit it. However, in the absence of such factors, a finding of fact based on the fact-finder's decision to believe the testimony of one of two or more witnesses can virtually never be clearly wrong or manifestly erroneous. *Rosell v. ESCO*, 549 So.2d 840 (La.1989); *Duncan v. State Department of Transportation and Development*, 556 So.2d 881 (La.App. 2d Cir.1990)."
>
> *Elliott* at 158-159.

These comments, applicable in *Elliott*, are not apropos in the case before us. Read in the context of the *Elliott* case, the statement of the court of appeal was fully justified. As the opinion in *Elliott* clearly reveals, the trial judge in that case erred in seeking evidence outside the record and acted unreasonably in ignoring the evidence which was properly before him.

The trial judge in the case before us wrote very well grounded reasons for his findings. I submit that his findings are not unreasonable. There is no objective evidence to contradict the facts as found by the trial judge. The finding that there was no injury-producing accident is

reasonable. There is no internal inconsistency or implausibility on the face of that finding. All we have in this case is a credibility evaluation of witnesses asserting two diametrically opposed contentions as to whether an accident causing an injury occurred or did not occur. I find no basis for disturbing the trial judge's finding of fact. Accordingly, I dissent. I would affirm the trial court's ruling.

Office of the Clerk
COURT OF APPEAL, THIRD CIRCUIT
STATE OF LOUISIANA
P.O. BOX 3000
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Clerk
Charles K. McNeely
Chief Deputy Clerk

Barbara B. Cox
Deputy Clerk - Civil
Roberta D. Burnett
Deputy Clerk - Criminal

JOHN WILLIAM BUTLER

Versus

No. 92 00071

ZAPATA HAYNIE CORPORATION

BEFORE: JED JMS UGT SRC JDS

ORDER

The Application for Rehearing herein having been duly considered:

IT IS ORDERED that a Rehearing be, and the same is hereby, refused.

Lake Charles, Louisiana

DATE: April 6, 1994.

DOMENGEAUX, C.J., would grant the rehearing.

STOKER, J., would grant the rehearing.

UGT
SRC
JDS
Judges

Kenneth J. deBLANC
Clerk

APPENDIX

THE SUPREME COURT OF THE STATE OF LOUISIANA

JOHN WILLIAM BUTLER

VS. NO. 94-C - 1171

ZAPATA HAYNIE CORPORATION

IN RE: Zapata Haynie Corporation; – Defendant(s); Applying for Writ of Certiorari and/or Review; Parish of Cameron 38th Judicial District Court Number 10-12075; to the Court of Appeal, Third Circuit, Number 92CA-0071

July 5, 1994

Granted in part with order. See per curiam.

HTL
PFC
WFM
PH
CDK
ROO

DENNIS, J. not on panel.

WATSON, J. would grant the writ and remand to the Court of Appeal to clarify the judgment.

Supreme Court of Louisiana
July 5, 1994

/s/ Frans J. La Branche, Jr.
Clerk of Court
For the Court

JUL 5 1994

SUPREME COURT OF LOUISIANA

No. 94-C-1171

JOHN WILLIAMS BUTLER

Versus

ZAPATA HAYNIE CORPORATION

PER CURIAM

Granted in part. In the decree by the court of appeal, two judges would have fixed damages for the loss of earning capacity at $294,670, one judge would have fixed this item at $150,000, and the two remaining judges would not have awarded any damages. Accordingly, there were not three votes for the $294,670 award by the "majority" opinion. The highest award for loss of earning capacity upon which a majority of three judges concurred was $150,000,[1] and that must be the amount of the award in the judgment.

The judgment of the court of appeal is therefore amended to reduce the award for loss of earning capacity to $150,000. Otherwise, the application is denied.

---

[1] The votes by two judges for $294,670 included a vote for $150,000, although those two judges would have awarded more than the majority consensus figure of $150,000.

JOHN WILLIAM BUTLER	:	38TH JUDICIAL
VS. NO. 10-12075	:	DISTRICT COURT
ZAPATA HAYNIE CORPORATION	:	PARISH OF CAMERON
	:	STATE OF LOUISIANA
	:	(Filed Sept. 16, 1991)

FONTENOT, JUDGE

The plaintiff, John William Butler, claims that he suffered an injury on April 24, 1989 while working as a seaman on a vessel owned by the defendant, Zapata Haynie. He claims a residual physical disability as a result of the injury.

What is certain is that on April 24, 1989, plaintiff was a member of the crew of the vessel, M/V Oyster Bayou. The vessel was engaged in catching menhaden, a fish widely referred to as a "pogy", in the Gulf of Mexico. The incident alleged by the plaintiff occurred on a "purse boat." This is a powered launch carried by the main vessel, called the "steamer." A steamer uses two purse boats in the fishing operation.

The purse boats are used to draw out a large net and to encircle the schools of menhaden. Each purse boat has a power block mounted on a swivel boom. The block is used to reel in the net. The power block can be moved vertically and horizontally by an operator in the bow of the purse boat. Plaintiff's testimony was that the swinging of the boom resulted in a blow to his head which caused his disabling injury. Defendants dispute that any such incident took place.

The bulk of the evidence in this trial turned on the events subsequent to April 24, 1989 but the first inquiry of the court must be whether or not the plaintiff can sustain his burden regarding the occurrence of an accident on April 24, 1989.

The seaman is said to have a "featherlight" burden in a civil action. But though his burden requires a showing of only the slightest negligence, he must still prove the accident and its causitive link with an injury. Osorio v. Waterman, S.S. Corp., 557 So.2d 999 (La. App. 4th Cir. 1990). Miller v. Lykes Brothers-Ripple SS Co. Inc., 98 F2d 185 (5th Cir. 1938). An analysis of the facts follows.

Plaintiff's version of events rest solely upon his testimony and that of two other crew members of the M/V Oyster Bayou, namely Oscar Dudley and George LeMelle. It was Butler's testimony that while doing his work in the purse boat as a cork puller, the power block was swung by the operator and struck him in the head. The impact broke the hard hat which he wore and knocked him unconscious. He then awoke in the hole of the ship where he was receiving medical attention. His injuries were disabling and he never returned to work as a fisherman because of the accident.

Plaintiff's fist witness on this issue was Oscar Dudley who testified that he remembered Butler being hit and being knocked unconscious. He further testified that the crew had to stop work when Butler got hit so that the injured seaman could be carried below deck.

George LeMelle was compelled to testify by the court. He had also been a member of the crew and he testified in open court to substantially the same facts

given by Dudley. He remembered the plaintiff receiving a serious blow to the head and the work stoppage that followed.

The versions recited above are directly contradicted by Bruce Mason, who was the captain on the M/V Oyster Bayou on April 24, 1989 and by Aldoise Hampton, the operator of the power block on the purse boat the day of the alleged incident.

It was Captain Mason's testimony that, from his vantage point in the other purse boat, he witnessed the power block coming into contact with the edge of plaintiff's helmet but that there was no blow. He testified that the hat was not knocked off and the plaintiff was unaffected by it. He went on to testify that after the crew had returned to the steamer, he was told that plaintiff was ill below deck. Upon the captain's inquiry, the plaintiff told him that his head hurt and he had gas on his stomach and gas on his arm. It is important to note that the plaintiff did not connect this condition to any incident on the purse boat or to any accident. The plaintiff's ailments were treated with an antacid and aspirin.

It was the captain's further testimony that upon reaching shore, Butler and the captain exchanged angry words about the performance of the crew. The conversation ended with plaintiff's quitting as a member of the crew. Later that evening, Butler returned and asked that an accident report be filed regarding a blow to his hard hat by the power block. Captain Mason initially refused, telling Butler that he was fabricating. Later the captain did file an accident report describing the accident as "minor."

Aldoise Hampton was the ring setter on the purse boat occupied by the plaintiff. In his job duties, he occasionally was called upon to operate the power block and was doing so at the time that plaintiff alleges his accident. It was Hampton's testimony that he did not see anyone get hit and no one was carried off of the purse boat. On cross examination, he admitted that from his position in the purse boat, some things could occur which would escape his attention but he testified that he would have noticed any interruption in the work and denied that any such interruption took place.

Faced with such contradictory testimony, the court has had the task of deciding whether the testimony in support of plaintiff's position is sufficiently trustworthy.

A review of the plaintiff's testimony, both in open court and through his earlier depositions, discloses him to be evasive and purposely vague. He admitted making false statements in his job application with the defendant herein relating to previous loss time accidents. He intentionally failed to mention an automobile accident, one he could hardly forget because he filed a lawsuit in connection therewith.

Plaintiff does not file income tax returns. When questioned about his previous employment, both at trial and earlier, major discrepancies in his testimony are irreconciliable [sic] and too glaring to be inadvertent.

He admitted in court that upon returning home after leaving the boat, he did not first go to a doctor for his injury but instead went to an attorney. When questioned about that suspicious development, he testified that he thought he was going to a doctor's office.

The plaintiff's credibility is further eroded when the testimony of the various doctors is analyzed. Each time a history was given to a physician, it failed to adequately disclose the significant events in plaintiff's past which would bear upon his current medical condition.

The testimony of Oscar Dudley and Philip LeMelle also does not bear close scrutiny. Both of these witnesses gave statements on April 26, 1989, two days after the alleged incident, in which they gave versions of the incident which agreed with the testimony of Captain Mason and Hampton and refuted that of the plaintiff. The explanations given by both of these witnesses at trial for recanting their statements was the same: that a bonus was paid to boats for not having accidents and that they had lied in order to protect the bonus.

This proffered justification for giving false testimony whenever convenient does not explain why LeMelle affirmed his initial statement with another statement as late as January of 1991, long after his incentive bonus was history.

In Dudley's case he admitted that he was related by marriage to the plaintiff, was a close acquaintance and was accompanying the plaintiff back and forth to the courthouse each day. Furthermore, Dudley gave testimony about his own earnings as a fisherman which was found to be absolutely false.

In summary, plaintiff's case must rest on his credibility and that of Dudley and LeMelle. The court concludes that their credibility is nonexistent. On the other hand, the testimony of Captain Mason and of Aldoise Hampton, neither of whom is still employed by Zapata

Haynie, was not impeached and there was no effort to do so.

In view of the above, it is the finding of the court that the plaintif [sic] has failed to prove the occurrence of an injury-causing accident while he was aboard defendant's vessel on April 24, 1989. Considering the above and foregoing, the plaintiff's petition is dismissed at his costs. The fees of the experts will be fixed by the court at the time that a formal judgment is presented reflecting these views which judgment will be signed upon presentation.

Cameron, Louisiana
September 10 , 1991

/s/ H. Ward Fontenot
H. WARD FONTENOT, DISTRICT

NOTICE OF JUDGMENT

JOHN WILLIAM BUTLER	:	38TH JUDICIAL
VS. NO. 10-12075	:	DISTRICT COURT
ZAPATA HAYNIE CORP	:	PARISH OF CAMERON
	:	STATE OF LOUISIANA
	:	(Filed Oct. 22, 1991)

TO: Raleigh Newman
435 10th Street
Lake Charles LA 700601

James B Doyle
700 St John Street
Lafayette LA 70502-3527

DEAR SIRS:

Notice is hereby given that, in the above numbered and entitled cause, judgment on TRIAL was rendered, read and signed in favor of the defendant and against plaintiff a true and certified copy of said judgement is attached hereto.

Granted under the impress of the seal of said Court, and my official signature this 22nd day of OCTOBER, 1991.

/s/ Claire Trahan
DEPUTY CLERK OF COURT

I hereby certify that a copy of the foregoing notice was this day mailed by me to the counsel/party as stated above at their last known address with postage prepaid.

/s/ Claire Trahan
DEPUTY CLERK OF COURT

JOHN WILLIAM BUTLER

VERSUS

ZAPATA HAYNIE CORPORATION

38TH JUDICIAL DISTRICT COURT

DOCKET NUMBER: 10-12075

CAMERON PARISH, LOUISIANA

(Filed Oct. 22, 1991)

****

JUDGMENT

The above cause came for trial on the merits on April 24, 25, and April 26, 1991. Present for the trial were James B. Doyle, representing the defendant, ZAPATA HAYNIE CORPORATION; and Raleigh Newman representing JOHN WILLIAM BUTLER, the plaintiff. The trial was heard and then submitted for consideration by the Judge and after deliberation, Judge H. Ward Fontenot returned Reasons for Ruling dated September 10, 1991 awarding Judgment in favor of the defendant, ZAPATA HAYNIE CORPORATION and against the plaintiff, JOHN WILLIAM BUTLER, and considering this verdict:

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment rendered herein in favor of the defendant, ZAPATA HAYNIE CORPORATION and against the plaintiff, JOHN WILLIAM BUTLER;

IT IS FURTHER ORDERED that the following expert fees will be fixed in the following amounts:

1. J.B. Jones $200
2. Dr. Frank P. Robbins $200
3. Charles Bettinger, economist $200

4. Dan Cliffe, economist $200

5. Rudy Vorenkamp, safety expert $100

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that all costs of the trial, including the above expert fees are to be paid by the plaintiff, JOHN WILLIAM BUTLER.

JUDGMENT READ, RENDERED AND SIGNED on this 21st day of October, 1991 at Cameron, Louisiana.

/s/ H. Ward Fontenot
DISTRICT JUDGE

Approved as to form:

VOORHIES & LABBE
(A Professional Law Corporation)

/s/ James B. Doyle
JAMES B. DOYLE/5061
Post Office Box 3527
700 St. John Street
Lafayette, Louisiana 70502
Telephone: (318) 232-9700

/s/ Raleigh Newman
RALEIGH NEWMAN/7569
435 10th Street
Lake Charles, Louisiana 70601
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NOTICE OF APPEAL
CIVIL CASE

(Filed Oct. 29, 1991)

JOHN WILLIAM BUTLER

vs.

ZAPATA HAYNIE CORP

TO:
Raleigh Newman
435 10th Street
Lake Charles LA 70601

James B Doyle
P O Box 3527
Lafayette LA 70502-3527

JAMIS Control No. _____

Case No. 10-12075

38th Judicial District Court

Parish of CAMERON
State of Louisiana

Division _____

H WARD FONTENOT
Judge Presiding

PATSY WILLIS
Court Reporter

12
Estimated Hours of
Testimony Taken

NOTICE is hereby given that on OCTOBER 22 , 1991 upon motion of plaintiff, John William Butler
(Give appellant's proper name and designate whether he is plaintiff, defendant, or intervenor, etc.)

an order of appeal was entered on October 23 , 1991 granting an appeal from the judgement of October 21 , 1991 , returnable to the COURT OF APPEAL, 3rd CIRCUIT 45 days after estimated costs are paid

The appeal taken was:

[ ] Suspensive Bond set at $_____

According to Law _____

[X] Devolutive Bond set at $_____

[ ] In Forma Pauperis

[ ] Act La. R.S. 13:4521 & 13:4581

I certify that the foregoing notice was this day mailed by me in accordance with Article 2121, La. C.C.P.

CAMERON , Louisiana, this the 29th day of OCTOBER , 1991 .

/s/ Claire Trahan
DY CLERK OF COURT

ATTENTION: Under Article 2126, La. C.C.P. all estimated costs of the appeal must be paid to the Clerk within 20 days.

EXTENSION OF RETURN DAY GRANTED
BY THE TRIAL COURT

The return day was extended from December 19 , 1991 to January 19 , 1992

Order Signed by Illegible Date Signed: Dec. 12, 1991

Reason for Extension: APPEAL IN COMPLETE

I certify that the foregoing extension notice was this day mailed by me in accordance with Article 2125, La. C.C.P.

CAMERON , Louisiana, this the 11th day of December , 1991 .

/s/ H. Ward Fontenot
Dy CLERK OF COURT

Lake Charles American Press

★★★ 4 SECTIONS LAKE CHARLES, LA., THURSDAY, DEC. 23, 1993 NUMBER 33,927 35 CENTS

Rift between appeal court judges growing

By HECTOR SAN MIGUEL
American Press Staff Writer

A growing rift between new and some veteran judges at the Third Circuit Court of Appeal in Lake Charles has the Southwest Louisiana legal community talking.

The problem stems from a high number of court cases overturned this year by five-judge panels at the appeal court.

The court's five new judges — Billie Woodard, John Saunders, Gene Thibodeaux, Sylvia Cooks and Oswald Decuir — were elected last year. In many of the overturned cases, at least two new judges on five-judge panels voted with the majority to overturn.

Area lawyers won't talk publicly about the controversy because they may have to bring cases before the judges.

One question they raise, however, is just what the court of appeal is supposed to do — and not do — when it reviews cases.

In most instances, the courts look for "manifest error" in cases. That means appeal judges can overturn a trial court decision if there is no reasonable basis for it. The appeal court is not supposed to second-guess a trial jury or judge its decision.

A dissent opinion, issued last week by Senior Appeal Court Judge Jerome Domengeaux, has apparently brought the issue to a head. The opinion concerned a civil case overturned by the appeal court, and is one of Domengeaux's last opinions before he retires at the end of this year.

Domengeaux was critical of the judges who voted to overturn the case, saying: "Applying the rules of appellate review stated above to the circumstances of this case, it is inconceivable that this case should be reversed.

"In overruling the trial judge, the majority throws the rule book out of the window."

Contacted at his Lafayette office Wednesday, Domengeaux said he had no comment about his opinion or reports of problems between the judges on the appeal court.

"It's not proper for a judge to comment about those matters. My opinion is self-explanatory," he said Wednesday.

"I have been on the Court of

Please see RIFT Page 6

Rift

Continued from Page 1

Appeals for 23 years. It has been my policy not to comment on opinions that I'm involved in. The documents speak for themselves."

Judge Thibodeaux denied any rift between the new and old judges. He admitted there is some friction, but said this is likely when there are 12 different personalities on the appeal court.

"The cases are not being reversed because of a failure to adhere to appellate rules and procedures," he said.

Those reversals by five-judge panels on the Third Circuit Court which have been heard by the Louisiana Supreme Court were upheld.

Two possible reasons for the number of cases overturned are the nature of the cases and a change in the court's makeup, Thibodeaux said.

"I think it's safe to say — and it's not an exaggeration — that the philosophical makeup of the court has shifted," he said.

"You are going to have different legal philosophies and different methods of interpretation whenever you have 12 different judges. I wouldn't elevate that to a rift. I would say it's a shift in philosophy."

Thibodeaux wasn't on the five-judge panel which overturned the case concerned in the Domengeaux dissent opinion.

Of the opinion, Thibodeaux said: "Because there is criticism doesn't mean the rules of appellate review haven't been followed. It's an existing question of how you interpret those rules."

Thibodeaux said all of the judges respect each other and work together though there are a lot of "strong opinions."

Domengeaux wrote his opinion on the Patrick Kelley versus Louisiana Limestone Aggregates case. It was heard by 14th Judicial District Court Judge Gregory Lyons. Kelly lost the case, but won it on appeal before the Third Circuit.

"Applying the rules of appellate review stated above . . . it is inconceivable that this case should be reversed," Domengeaux wrote. "In overruling the trial judge, the majority throws the rule books out of the window."

In this case, Lyons dismissed Kelly's suit against his employer for supplemental earnings and medical expenses incurred after July 6, 1984. It was found by the court that they were unrelated to his on-the-job injury sustained Feb. 6, 1984.

Kelly appealed the case, stating that he was entitled to supplemental earnings benefits after Aug. 20, 1985, his last day of work, and medical expenses after July 6, 1984.

A five judge panel of Domengeaux, Henry Yelverton, Jeannette T. Knoll, Saunders, and Woodard heard the appeal. The panel reversed the court's decision by a 3-2 vote with Woodard, Saunders and Knoll voting to overturn.

Judge Knoll is not a new judge. She is serving her second term on the appeal court.

In his dissent opinion, Domengeaux shows his displeasure with what the majority had done.

"I respectfully suggest that the majority opinion represents a dramatic departure from the recognized rules of appellate review," he wrote.

"I feel rather embarrassed to repeat some of them here, but at the risk of redundancy, do so in the hope that it may benefit some who do not know they exist."

The senior judge cites a Louisiana Supreme Court case which states that a court of appeal may not set aside a finding by a trial court or a jury unless there is "manifest error" or unless it is "clearly wrong."

"Where there is conflict of testimony, reasonable evaluation of credibility, and reasonable inferences of fact should not be disturbed upon review, even though the appellate court may feel its own evaluations and inferences are as reasonable."

The judges review the case from typed transcripts of the court proceedings, and do not have the benefit of hearing and watching the actual witnesses in the case.

Yelverton dissented in the Kelley case for the same reasons Domengeaux did, court documents show.

Initially, the appeal court's decision was stamped: "Not designated for publication." This means the case would not appear in legal journals which cite important cases heard by the appeal courts and Louisiana Supreme Court.

However, a letter was issued two days after this decision was rendered. It stated: "The panel has since decided that the opinion and accompanying dissent should be published."

A legal brief filed by Lake Charles attorney Jim Doyle, who represented the company in this case, touched on the controversy about the appeal court's action on reversals.

"Anyone litigating any substantial amount of cases before this court knows that 1993 has been a banner year for five-judge panels, which are compiled only when two judges vote to reverse a trial court's findings in a civil case," Doyle wrote.

"In addition to the fact that trial judges are being reversed routinely, the way trial judges are being reversed should be of some concern to those who desire certainty in appellate review," he wrote.

The brief describes getting information from the Third Circuit Court on five-judge panels as "a difficult process."

"In several phone calls, undersigned counsel was ultimately told that no such statistics were available," Doyle wrote.

Doyle was told by Kenneth deBlanc, Clerk of Court, that "the only source from which this information could probably be gleamed" was "heldover sheets," according to the brief.

These sheets "are private and intended for circulation only among members of the court. But in comments from other practicing lawyers, it is clear that 1993 has seen an explosion of five-judge panels," he wrote.

Doyle said in his brief that he has had three cases go before the appeal court through Nov. 15, and all three ended up before a five-judge panel.

"In the previous 17 years, this counsel has had 19 cases before the various circuit courts of appeal and never until 1993 had a five-judge rehearing," he wrote.

Doyle found in his research the Third Circuit Court of Appeal has reached opinions in 13 cases this year as of mid-November involving five-judge panels.

"Two of those involve five-judge opinions which have not, for one reason or another, been released for publication," he wrote.

The Third Circuit Court only issued two such opinions in 1990, one in 1991 and one in 1992, according to his brief.

In comparison, Doyle found the First Circuit Court of Appeal in Baton Rouge and Second Circuit Court of Appeal in Shreveport have each issued one opinion as of Nov. 15 involving a five-judge panel.

The Fourth Circuit Court of Appeal in New Orleans issued three opinions involving five-judge panels during the 11 months, but two of the cases were election-related and not civil cases, Doyle wrote.

There were no five-judge panel opinions issued by the Fifth Circuit in Gretna in the same period.

Supreme Court, U.S.
FILED
NOV 1 1994
OFFICE OF THE CLERK

No. 94-616

In The

Supreme Court of the United States

October Term, 1994

ZAPATA PROTEIN (USA), INC. (formerly known as ZAPATA HAYNIE CORPORATION),

Petitioner,

vs.

JOHN WILLIAM BUTLER,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeal, Third Circuit, State of Louisiana

RESPONDENT'S BRIEF IN OPPOSITION

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BEST AVAILABLE COPY

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No. 94-616

In The

Supreme Court of the United States

October Term, 1994

ZAPATA PROTEIN (USA), INC. (formerly known as ZAPATA HAYNIE CORPORATION),

Petitioner,

vs.

JOHN WILLIAM BUTLER,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeal, Third Circuit, State of Louisiana

RESPONDENT'S BRIEF IN OPPOSITION

John William Butler, respondent, respectfully prays that a writ of certiorari to review the judgment of the Court of Appeal, Third Circuit, State of Louisiana, entered on February 23, 1994, be denied.

STATEMENT OF THE CASE

A somewhat detailed recitation of the facts is necessary, since petitioner's statement of the case presents a totally erroneous view of the facts of this incident, unsupported by citation to the record. A review of the facts as indicated by appropriate reference to the record, will illustrate to this Court the necessity of the Court of Appeal's reversal in this case.

One needs to look at the background of this case in order to fully appreciate the reversal by the Court of Appeal. The petitioner, Zapata Haynie, operates a large menhaden plant in Cameron Parish. Cameron Parish is a small, rural parish, known as counties in other states, in southwest Louisiana. It is one of the largest employers and tax payers in Cameron Parish. Zapata operates several mother ships which are normally captained by a white captain, a white mate, and several black seamen. Zapata has a policy of requiring every seaman to sign a form at the end of each voyage that not only did he not sustain any injury, but that he was not a witness to any accident. Additionally, if any crew member has an accident, then the entire crew will forfeit their $500 bonus each and the captain will forfeit his $2,000 bonus. It is respectfully submitted that this has the effect of intimidating many of these menhaden fishermen to deny that they were witnesses to any accident, whether the accident happened or not.

In reaching his conclusion that no accident had in fact befallen the respondent seaman, the trial judge relied heavily on his interpretation that the seaman's story had been directly contradicted by the witnesses called on behalf of the employer, Zapata. (R. 94.5). However, the record indicates, and the Court of Appeal found, that the conclusions of the trial court in this regard were directly refuted by the record.

For example, the trial judge found that "the versions recited

[by the respondent] are directly contradicted by Bruce Mason . . . and by Aldoise Hampton." (R. 94). In actuality, Bruce Mason corroborated Butler's testimony in several key respects. First of all, Mason testified that there had been repeated difficulties with proper function of the power block. Although Mason reported these problems to Zapata, the block had never been repaired. (R. 239-40). In fact, the evidence revealed that the day after Butler's accident, Mason turned in yet another work order requesting repair of the power block. (R. 261-2).

Although the trial judge accepted Mason's assertion that any accident involving the respondent Butler was extremely minor in nature and could have caused the respondent no injury, Mason himself freely admitted that the accident as described by the respondent may have occurred while Mason was not present. (R. 241, 266). On April 24, 1989, Butler was working on the mate's purse boat, while Mason divided his duties between the captain's purse boat and the mother ship, or steamer. (R. 256-8, 265). Further, Mason verified that Butler's duties required him to work in close proximity to the power block, and that being struck in the head by a wildly swinging, 300-pound piece of machinery would undoubtedly cause serious injury. (R. 246, 260).

Significantly, the trial judge discussed Mason going to check on the injured Butler as the seaman lay in his bunk aboard the mother ship, and noted "It is important to note that the plaintiff did not connect this condition to any incident on the purse boat or to any accident." (R. 94). However, the record clearly reveals (at R. 273), that Mason testified, *in response to questioning by the trial court*, that Butler did in fact tell Mason at this time that he (Butler) had been struck in the head with the power block while aboard the purse boat. Mason then admitted that he did not question Butler about the details of Butler's accident, nor did he discuss the incident with other crewmen, but merely made out an accident report based on his own earlier observations. (R. 274).

Mason's testimony did, however, directly contradict that of Zapata management personnel. Despite the employer's denials, Mason testified that he did file an accident report, he did hear other crew members talking about Butler's accident, and he did know that Zapata obtained statements from all the crewmen two or three days after the accident. (R. 257, 266).

Aldoise Hampton did not appear at trial and testified via deposition. The Court of Appeal summarized his testimony as follows (at Petitioner's App. 11):

> Hampton admitted that he may not have been able to see everything from his position as operator of the block. He simply stated that he did not see anyone being hit by the block and did not notice any work interruption. In fact, Hampton's testimony corroborates to a certain extent the plaintiff's version. The block could have struck Butler without Hampton's knowledge, according to Hampton. Moreover, Hampton hollered "look out" when the block started to move, and he also heard someone yell to "watch the block," just as Butler testified to. Although Hampton stated he did not strike Butler with the block, he knew that Butler "got hurt," prompting him to check on Butler's condition.

Fellow seamen Oscar Dudley and George Lemelle both provided corroboration of Butler's story in all pertinent respects. (R. 504-5, 642-4). Both explained that they did not give the complete story to Zapata's investigators immediately following the accident for fear of losing their accident-free bonus. (R. 508-9, 539, 644). It was undisputed that Zapata informed all crew members that their $500 bonus would be forfeited if there was a reported accident during the voyage.

Most important of all, objective medical evidence provided independent corroboration for the respondent's claim of injury. The significance of these facts was totally unaddressed by the trial court. Butler's treating physician, Dr. Frank Robbins, saw Butler two days after his accident, at which time the patient gave a history of having been hit in the left side of the head with a swinging power block. (R. 347-8). Dr. Robbins did a very careful clinical examination and found in his words "*very definite evidence of trauma at the C5-6 level*". He further stated that he had *positive evidence* that respondent had suffered a significant *recent traumatic injury* to the head and neck. (R. 347-8). Dr. Robbins felt that it was absolutely essential that respondent have an MRI, which MRI was done on August 21, 1990. The MRI showed a central posterior disc herniation at C5-6 level that was impressing on the spinal cord and subarachnoid space, with consequent narrowing of the spinal cord. (R. 355).

Dr. Robbins referred respondent to Dr. William Foster, a neurosurgeon, who saw respondent on May 4, 1989, nine days after his accident. Dr. Foster's examination revealed marked muscle spasms and marked restriction of motion of the neck in all directions especially with hyperextension. Respondent was then sent by Zapata to Dr. Gerald Litel, a neurosurgeon on July 23, 1990 for a so-called I.M.E. with Dr. Litel finding that respondent had sustained a concussion and that the symptoms were consistent with cervical injury and radiculopathy. (Exhibit P-13).

Finally, the testimony of Dr. Robbins and Dr. Foster was uncontradicted as to the fact that if Butler had sustained this injury prior to April 24, 1989, he would never have been able to perform his duties as a fisherman, which is extremely hard work. (R. 357-8, 364, 393).

Based on the above evidence, the Court of Appeal concluded that the trial judge was clearly wrong in determining that no

accident had occurred. In his concurring opinion, Judge Saunders noted,

> I have reviewed that entire record in this case and do not find any evidence to support the proposition that the plaintiff, John Butler, was not struck by the boom of the M/V Oyster Bayou.

(Petitioner's App. 27).

Accordingly, the Court of Appeal reversed the judgment of the trial court and rendered judgment in favor of Butler. Petitioner Zapata also makes the assertion that this case remained under advisement for almost two years, as if to imply that this would provide support for their assertion that the Court of Appeal was struggling to justify a result-oriented opinion. In fact, the case was argued in February of 1993 and the opinion issued in February of 1994. Finally, the Louisiana Supreme Court granted Zapata's writ application and reviewed *the entire case.* After complete review, the Louisiana Supreme Court reversed only as to an issue of damages, not now before this Court.

It is noteworthy that Zapata was clearly trying to hide the fact of the accident. This is made evident by the following under oath:

> a. In answers to Interrogatories #5 and #7 on 2/1/90 defendants stated under oath that they had no reasons to believe that plaintiff may have been injured on 4/24/89 and that no one had any reason to believe that he may have sustained an accident or injury.
>
> b. Leonard Nunez, defendant's claim specialist, testified under oath that his first

notice of any accident was on 5/11/89 when he received a letter or representation from attorney Gano.

c. Richard Brunner, corporate risk manager for Zapata, testified that there was nothing in the file to indicate that plaintiff was in an accident, that no signed statement raised a red flag that plaintiff may have had an accident and that no statements were taken until plaintiff told Bob Schwartz, the local manager, on 5/24/89 that he had an accident.

d. This is extremely strange in view of the fact that on 4/26/89, *only two days after this accident,* Zapata's adjuster, JoAnna Olsen, took signed statements from crew members in the mate's boat specifically directed to Plaintiff's accident, and accident they claim they received their first notice of almost two months post-accident.

SUMMARY OF ARGUMENT

Petitioner contends that Louisiana courts have misinterpreted the ruling of this Court in *Icicle Seafoods, Inc. v. Worthington;*[1] however, that decision plainly authorized the Court of Appeal for the Third Circuit to utilize the standard of review provided by the Louisiana Constitution[2] in this case. But this contention of petitioners merely begs the question, as the jurisprudence is

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1. 475 U.S. 709, 106 S. Ct. 1527, 89 L. Ed. 2d 739 (1989).

2. Article 5, Section 10(B) of the Louisiana Constitution provides that the scope of appellate review extends to law and facts.

uniform in holding that the "manifestly erroneous" standard of review of the state courts and the "clearly wrong" standard of federal appellate review are virtually synonymous. Dissatisfied with the result obtained in the Court of Appeal, Zapata is in reality asking the Court to make a *de novo* review of the facts and decide in petitioner's favor. No aspect of federal law has been compromised by the judgment of the Court of Appeal, and it is not the role of this Court to engage in retrial of factual issues.

Further, the well-established jurisprudence of both Louisiana and federal courts recognized that prejudgment interest may be awarded on all items of damages other than future, non-economic losses.[3]

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3. *McFarland v. Justiss Oil Co.*, 526 So. 2d 1206 (La. App. 3rd Cir. 1988); *Pickle v. International Oilfield Divers, Inc.*, 791 F.2d 1237 (5th Cir. 1986).

REASONS FOR DENYING THE WRIT

I.

THIS COURT'S DECISION IN *ICICLE SEAFOODS, INC. V. WORTHINGTON* PROVIDES THAT A STATE'S APPELLATE COURTS ARE TO APPLY THE STANDARD OF REVIEW MANDATED BY STATE LAW IN ALL CASES SUBJECT TO THEIR JURISDICTION.

Congress has specifically recognized and preserved for the seaman the right to elect to bring his admiralty or maritime claim in state court, pursuant to the provisions of the "saving to suitors clause".[4] The seaman has been given special status in the maritime law as the ward of the admiralty, entitled to special protection not extended to land-based employees.[5] Furthermore, the ward of the admiralty has been given additional deference to his choice of forum, in that a seaman's case filed in state court is nonremovable to the federal district court, even in the presence of diversity of citizenship.[6]

These provisions reflect the intent of Congress to accord the Jones Act seaman the absolute right to have his case heard in state court, if he so chooses.

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4. Section 1333(1) of Title 28 provides that the district courts shall have original exclusive jurisdiction of any civil case of admiralty or maritime jurisdiction, but reserves to claimants all other remedies to which they are otherwise entitled.

5. *Aguilar v. Standard Oil Co.*, 318 U.S. 724, 63 S. Ct. 930, 87 L. Ed. 1107 (1943).

6. The provisions of the Federal Employer's Liability Act, 45 U.S.C. § 51 *et seq.*, have been adopted by reference in the Jones Act, 46 U.S.C. § 688. Section 1445(a) of Title 28 provides that these claims are nonremovable.

Despite petitioner's assertions to the contrary, this Court's holding in *Icicle Seafoods, Inc. v. Worthingon, supra,* was clear and unequivocal, and is directly dispositive of the issue now before the Court.

The respondents in *Worthington* sued their employer, claiming overtime benefits pursuant to the provisions of the Fair Labor Standards Act. The employees' suit was brought in federal district court, wherein the trial judge held that the claimants were seamen and, therefore, excluded from coverage under the Act. The Ninth Circuit Court of Appeal reversed, applying a "de novo" standard of review. This Court granted certiorari in *Worthington* to resolve the question of whether the Court of Appeal applied the correct standard of review.

The Supreme Court held that the standard of review to be applied to the facts in *Worthington* by the Ninth Circuit was that set forth in Rule 52(a) of the Federal Rules of Civil Procedure, "like the facts in other civil bench tried litigation *in federal courts.*"[7] Most significant for our purposes, however, was the Court's limitation of its holding to those cases which are *tried in the federal system.* The Court reaffirmed its holding in *Levinson v. Spector Motor Service,*[8] and noted

> (S)tate courts are not required to apply rule 52(a) — a rule of *federal* civil procedure — to their own appellate system for reviewing factual determinations of trial courts.[9]

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7. 475 U.S. at 713, 106 S. Ct. at 1529 (emphasis supplied).

8. 330 U.S. 649, 67 S. Ct. 931, 91 L. Ed. 1158 (1947).

9. 475 U.S. at 712, 106 S. Ct. at 1529.

In *Levinson,* although the plaintiff brought a claim under a federal statute (The Fair Labor Standards Act), the standard of review was that provided by *state* law, since the case was tried and appealed in the state courts.

Petitioner cites no case or other authority for the proposition that the clear language of *Worthington* is inapplicable to this case, and that the applicable standard of review for a Jones Act case brought in state court pursuant to the "saving to suitors" clause is that set forth by the federal rules.

In fact even the dissenting opinion for the Third Circuit Court of Appeal rejected Zapata's argument that Rule 52(a) governed the state court of appeal's review of this case, noting that this contention was contrary to the holding of this Court in *Worthington, supra,* as well as the opinion of the Louisiana Supreme Court in *Daigle v. Coastal Marine, Inc.,*[10] and the holding of the Third Circuit Court of Appeals itself in *Hanks v. Barge Transport, Inc.*[11]

Therefore, it is clear that the "manifest error" standard of review provided by Louisiana law was the correct standard of review to be used by the Third Circuit Court of Appeal in this case.

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10. 488 So. 2d 679, 682 (La. 1986).

11. 563 So. 2d 1297, 1300 (La. App. 3rd Cir.), *writ denied,* 569 So. 2d 964 (La. 1990).

II.

EVEN IF FEDERAL RULE OF CIVIL PROCEDURE 52(a) PROVIDED THAT APPROPRIATE STANDARD OF REVIEW IN THIS CASE, THE "MANIFEST ERROR" STANDARD UTILIZED BY THE LOUISIANA THIRD CIRCUIT COURT OF APPEAL IS VIRTUALLY INDISTINGUISHABLE FROM THE FEDERAL PROVISION.

Again, Zapata's argument that there is some significant distinction between the Rule 52(a) "clearly erroneous" standard of review and the "manifest error" standard utilized in Louisiana state courts is succinctly refuted by the dissent in the Third Circuit Court of Appeal opinion.

> Finally, it would appear that the federal standard for appellate review of factual determinations is virtually identical with the Louisiana standard of Rosell[12] and Stobart.[13] In a per curiam opinion by Judges Politz, King and Smith of the U. S. Court of Appeal for the Fifth Circuit, the court used language which is almost a quotation from Rosell. *Schexnider v. McDermott International, Inc.*, 868 F.2d 717, 720 (5th Cir. 1989).[14]

For example, we would refer the Court to the language of the very recent Louisiana Supreme Court case of *Ambrose v. New*

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12. *Rosell v. ESCO*, 549 So. 2d 840 (La. 1989).

13. *Stobart v. State through DOTD*, 617 So. 2d 880 (La. 1993).

14. Petitioner's App. 46 (footnote omitted).

Orleans Police Amb. Serv.,[15] wherein the court stated:

> . . . Although deference to the factfinder should be accorded, the court of appeal and the Louisiana Supreme Court, nonetheless have a constitutional duty to review facts. Of course the reviewing court may not merely decide if it would have found the facts of the case differently. Rather, notwithstanding the belief that they might have decided it differently, *the court of appeal should affirm the trial court where the latter's judgment is not clearly wrong or manifestly erroneous. Because the court of appeal has a constitutional function to perform, it has every right to determine whether the trial court verdict was clearly wrong based on the evidence or clearly without evidentiary support.*

In fact, Zapata's brief in support of its petition for writ of certiorari states (at p. 27):

> Louisiana's rules of appellate review, properly interpreted, are not the problem; they set up a standard similar, if not identical to, the common law.

Therefore, petitioner cannot allege that any provision of Louisiana law or jurisprudence is in conflict with the federal common law, even if the federal law provides the applicable rule of decision in this case.

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15. 639 So. 2d 216, 221 (La. 1994) (footnotes omitted) (emphasis supplied).

III.

PETITIONER'S CRITICISM OF THE DECISION OF THE LOUISIANA THIRD CIRCUIT COURT OF APPEAL'S JUDGMENT DOES NOT RAISE AN ISSUE APPROPRIATE FOR RESOLUTION BY THIS COURT.

The brief in support of petitioner's application for writs of certiorari offers a variety of criticisms regarding the state of Louisiana law and jurisprudence. For example, Zapata contends that this Court's decision in *American Dredging Co. v. Miller*[16] allows Louisiana courts to exercise jurisdiction in cases where such should not be allowed (p. 11); Louisiana takes an overly "activist" role in the maritime arena (p. 12); Louisiana procedural law unfairly allows the plaintiff to select the mode of trial, be it judge or jury[17] (p. 12-13); Louisiana statute allows the plaintiff to bring a "direct action" against insurers,[18] another provision which is somehow viewed as unfair by petitioner. Zapata also criticizes several decisions of the Louisiana courts, alleging that these cases stand for the proposition that the Louisiana appellate courts may reverse on the facts whenever they please.[19]

Yet the fact is that none of these issues are before the Court in this case. Petitioner asserts that Louisiana's standard of review is inconsistent with federal law; indeed, violative of due process. But nowhere does petitioner indicate that Louisiana law or jurisprudence authorizes a *de novo* review of the facts by the

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16. __ U.S. __, 114 S. Ct. 981, 127 L. Ed. 2d 285 (1994).

17. Louisiana Code of Civil Procedure Article 1732(6).

18. Louisiana Revised Statutes 22:655.

19. These cases are set forth at page 14, note 8 of petitioner's brief.

appellate court. Furthermore, even a cursory reading of the opinion of the Court of Appeal indicates that *the manifest error/clearly wrong standard of review was followed in this case.*[20]

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20. We would refer the Court to (a) App. 6, wherein the Court of Appeal sets forth its holding that the trial judge was *manifestly erroneous* in its findings, (b) App. 7, at which the Court of Appeal designates the issues in terms of whether the trial court's findings were *manifestly erroneous*, (c) App. 8, providing a discussion of the applicable standard of review as set forth by the Louisiana Supreme Court in *Stobart v. State of Louisiana, Through DOTD, supra:*

> A court of appeal may not set aside a trial court's or a jury's finding of fact in the absence of "manifest error" or unless it is "clearly wrong." Rosell v. ESCO, 549 So. 2d 840 (La. 1989). This court has announced a two-part test for reversal of a factfinder's determinations:
>
> 1) The appellate court must find from the record that a reasonable factual basis does not exist for the finding of the trial court and
>
> 2) the appellate court must further determine that the record establishes that the finding is clearly wrong (manifestly erroneous).
>
> . . .
>
> Even though an appellate court may feel its own evaluations and inferences are more reasonable than the factfinder's reasonable evaluation of credibility and reasonable inferences of fact should not be disturbed upon review where conflict exists in the testimony.

(d) App. 9-10, wherein the court determines that the trial court's conclusion that "plaintiff's version of events rest (sic) *solely* upon his testimony and that of two other crew members. . ." was *not supported by the record*, (e) App. 10, where the court again found that the trial court's observation that the plaintiff's version of

(Cont'd)

If for example, the Court of Appeal or the Louisiana Supreme Court had held that intermediate court was authorized to make a *de novo* review of the facts, petitioner might well be able to stand grounds for granting certiorari. But such is not the case. The application does not raise any considerations governing review on a writ of certiorari as set forth by Rule 10.1(b) or 10.1(c) of the Rules of the Supreme Court. There is no allegation here that a rule of Louisiana law or jurisprudence has undermined or controverted some important federally protected right of Zapata. What happened is that the Court of Appeal reviewed the entire record and found that the trial judge's conclusions were clearly wrong, because they were not supported by the evidence. There is no error in this ruling. Zapata is asking *this* Court to make a *de novo* review of the evidence in this case and decide in their favor. This is not an issue appropriate for resolution by this Court.

(Cont'd)
the accident was "directly contradicted" by the defendant's witnesses was *not supported by the record,* (f) App. 11, at which the court found that the trial court's important conclusion that plaintiff failed to connect his condition to any accident was *not supported by the record,* (g) App. 15, wherein the court rules that the trial judge committed an error of law in failing to recognize the legal presumption that the accident caused the injury, since Butler was in good health prior thereto, (h) App. 17, where the court concludes:

> Given the circumstances enumerated above, this court is left with the *unmistakable belief* that an accident occurred on April 24, 1989 which injured John Butler. The trial court was *manifestly erroneous* to find otherwise.

and finally, (i) App. 27, wherein the concurring opinion holds that "the record conclusively shows that there was an accident."

IV.

THE AWARD OF PREJUDGMENT INTEREST IS AUTHORIZED IN A JONES ACT CASE TRIED TO THE COURT WITHOUT A JURY.

Zapata also contends that the Court of Appeal was unauthorized to make an award of prejudgment interest in this case, since there was no finding of unseaworthiness, and, therefore, no claim under general maritime law. However, this is not the law. The cases cited by Zapata all involve Jones Act claims tried to a *jury*. Where, as here, the seaman elects a bench trial, prejudgment interest may be recovered and is, in fact, the rule rather than the exception.

In *McFarland v. Justiss Oil Co., Inc.*,[21]

> Although pre-judgment interest is not recoverable in a Jones Act suit brought on the law side, i.e., tried to a jury, such is not the case where a Jones Act action is brought under the court's admiralty jurisdiction (tried to a judge) where the award of pre-judgment interest lies within the sound discretion of the trial judge.[22]

Therefore, it is well established both in the United States Fifth Circuit and in Louisiana admiralty jurisprudence that prejudgment interest is a recoverable item of damages in a Jones Act case tried to the court without a jury.

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21. 526 So. 2d 1206, 1215 (La. App. 3d Cir. 1988).

22. In support of this principle, the court cited the Fifth Circuit cases of *Doucet v. Wheless Drilling Company*, 467 F.2d 336 (5th Cir. 1972) and *Williams v. Reading and Bates Drilling Co.*, 750 F.2d 487 (5th Cir. 1986).

Moreover, the Third Circuit's award of prejudgment interest on all items of damages except for future non-economic losses is in direct accord with the dictates of the United States Fifth Circuit Court of Appeal's opinion in *Pickle v. International Oilfield Divers, Inc.*[23]

> An award of prejudgment interest in an admiralty case is within the district court's sound discretion and does not depend on evidence of delay. "In fact, generally in maritime law, prejudgment interest should be awarded." . . . We find no abuse of discretion in the award of prejudgment interest on damages for all losses that occurred prior to trial.
>
> IOD further maintains that the court erred by awarding prejudgment interest on damages for loss of future income and for *future* pain and suffering. That challenge is meritorious as it relates to the interest on damages for future pain and suffering. . . .
>
> We therefore vacate that part of the judgment and remand this question to the court a quo for a recalculation of prejudgment interest, *excluding therefrom interest on future, unaccrued non-economic damages.*

Not only was the Court of Appeal authorized to make the prejudgment interest award in this case as to all items of damages except future non-economic losses, but there was no evidence in

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23. 791 F.2d 1237 (5th Cir. 1986) (citations omitted) (emphasis supplied). This portion of the *Pickle* opinion was cited by the court in *McFarland, supra*, at 526 So. 2d 1215-16.

the record which would support the denial of such an award. This assignment of error is without merit.

CONCLUSION

Since there is no basis whatsoever for Zapata's contention that Louisiana's standard of appellate review prevents uniform application of the maritime law, or their contention that the award of prejudgment interest was unauthorized in this case, the petition for writ of certiorari should be denied. It is neither the function or role of this Court to engage in *de novo* review of the facts on behalf of dissatisfied litigants.

Respectfully submitted,

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No. 94-616

Supreme Court, U.S.
FILED
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Petitioner,

versus

JOHN WILLIAM BUTLER,

Respondent.

Petition For Writ Of Certiorari To The Court Of Appeal, Third Circuit, State Of Louisiana

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI OF ZAPATA PROTEIN, (USA) INC. (formerly known as ZAPATA HAYNIE CORPORATION)

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PRELIMINARY STATEMENT

Rule 15.7 of this Court allows the filing of supplemental briefs while the Petition for Writ of Certiorari is pending, as long as the supplemental brief addresses intervening matters not available at the time of the parties' last filing. As a result of the response brief filed on behalf of John William Butler, this Court is now called upon to determine, in connection with the Court of Appeals' award of prejudgment interest, whether Louisiana's statute allowing for trial by a Judge alone, at the plaintiff's discretion, creates a "state admiralty jurisdiction."

ARGUMENT

Respondent John William Butler argues in his response brief that, solely because of his trial court election to proceed without a jury, he is entitled to recover prejudgment interest on his Jones Act Claim even though his general maritime law claims were dismissed. This position necessarily requires Butler to assert inferentially that Louisiana's procedural choice in this regard places Louisiana trial judges on the same level as Article III Federal judges sitting in admiralty.

Because Louisiana is not free to fashion such a remedy, prohibited by Article III of the Constitution and this court's decisions in *Southern Pacific v. Jensen*,[1] and *American Dredging*

[1] 244 U.S. 205, 37 S.Ct. 524, 61 L.Ed. 1086 (1917).

Co. v. Miller,[2] Butler's claim is without merit. Consistent with Butler's response to the other issues raised in the application, he would have this Court superficially focus on language in statutes and prior cases which, on the surface, support his position but ignore the fundamental questions which exist upon closer examination. In each case, his response brief, instead of creating doubt as to the wisdom of granting Zapata's application, supports such action by this Court.

A. Even though Louisiana's procedural device allowed for the trial of this case by a judge alone, Butler's claim remained one "at law."

Butler confuses the procedural denial to Zapata of a jury trial[3] with the creation of admiralty jurisdiction in state court. Since the Federal Constitution provides a grant of judicial power to "all Cases of Admiralty and Maritime Jurisdiction,"[4] whatever effect the statute may have, it cannot include such a creation.

If it does not, Butler's claim remains one brought "at law." Section 9 of the Judiciary Act of 1789 enacted the first "Savings Clause," which had the effect of providing concurrent jurisdiction to state and federal courts, not of admiralty and maritime claims, but only claims asserting a " . . . common law remedy, where the common law is competent to give it."[5]

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[2] ___ U.S. ___, 114 S.Ct. 981 ___ L.Ed.2d ___. (1994).

[3] See La. Code of Civil Procedure Art. 1732 (6) at page 4 of Zapata's application.

[4] U.S. Constitution, Article III, Section 2.

[5] 28 U.S.C. 1333, prior to the 1948 amendment; *see also* discussion in *Linton v. Great Lakes Dredge and Dock Co.*, 964 F.2d 1480 (5th Cir. 1992) at pp. 1484-1487.

Prior to the statute's amendment in 1948, this Court said:

> "The 'right of a common law remedy' so saved to suitors, does not . . . include attempted changes by the states in the substantive admiralty law, but it does include all means other than proceedings in admiralty which may be employed to enforce the right or redress the injury involved.[6]

Even though the clause now specifically saves " . . . all other remedies to which [suitors] are otherwise entitled . . . ,"[7] this Court has preserved the distinction between admiralty and "common law," or in this case general maritime law, claims.[8] Commenting on that decision, Professors Gilmore and Black suggest that the change in language was, except in certain limited circumstances, inconsequential.[9] Finally, a claim that a Louisiana trial judge enjoys a status equal to that of a federal district judge in disposing of admiralty matters was specifically rejected on a removal question in *Linton, supra* at footnote 5.

Thus, Butler's claim began as a saved, "at law" claim brought under the state court's concurrent jurisdiction. It

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[6] *Red Cross Lines v. Atlantic Fruit Co.*, 264 U.S. 109, 44 S.Ct. 274, 68 L. Ed. 582 (1984).

[7] 28 U.S.C. 1333, as amended.

[8] *Madruga v. Superior Court*, 346 U.S. 556, 74 S.Ct. 298, 98 L.Ed. 290 (1954).

[9] Grant Gilmore and Charles L. Black, *The Law of Admiralty*, Sections 1-13 (2d Ed. 1975).

never adopted any other character, regardless of the procedural incidents attached to his claim by Louisiana law, because that would have been prohibited by this Court's clear jurisprudence and by the Constitution itself.

B. If Butler's claim remained one "at law," absent a finding of unseaworthiness or other general maritime law negligence, he is prohibited from an award of prejudgment interest.

Butler relies, in the main, on a Louisiana appellate case from the same circuit as the opinion questioned here in support of his proposition that trial by a judge alone creates a different theoretical premise for the award of prejudgment interest. His reliance is misplaced.

First of all, the decision of the Court of Appeal in that case affirmed a finding of unseaworthiness of the vessel, the general maritime law basis for the award of interest, which Butler lacks here.[10] Thus, even though the Court's opinion made reference to the distinction between judge trials and jury trials,[11] such an exercise was unnecessary. McFarland was entitled to prejudgment interest because he won his unseaworthiness claim. Butler is not entitled to prejudgment interest because he lost on that claim and because his case remains one brought "at law" as far as his Jones Act remedies are concerned.

As pointed out in the original petition, this distinction is one of great significance because even Louisiana

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[10] *McFarland v. Justiss Oil Co., Inc.*, 526 So.2d 1206 (La. App. 3d Cir. 1988), at p. 1208.

[11] *E.g.* at p. 1215.

courts have unanimously recognized the difference between availability of prejudgment interest in a saved state court action brought pursuant to the Jones Act and one which awards damages on both the Jones Act and unseaworthiness counts.[12] In so doing, Louisiana follows the "general rule" of the federal courts, which allows prejudgment interest only when the case is tried to a judge alone, sitting as a federal admiralty court.[13]

Since federal jurisprudence addresses issues directed not towards a judge-jury distinction, but the bright line between admiralty and at law claims, its theoretical basis is more clear:

> [Plaintiff] also maintains that he is entitled to an award of prejudgment interest. Since [plaintiff] did not prevail on his unseaworthiness claim, his sole basis for recovery is Jones Act negligence. It is well settled that in actions at law under the Jones Act, the recovery of prejudgment interest is not permitted.[14]

CONCLUSION

Butler's response brief points out perhaps better than Zapata's application the extent to which Louisiana jurisprudence may be twisted to achieve an anomalous result.

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[12] See Cases cited at Footnote 22 of the original application.

[13] *See, e.g., McPhillamy v. Brown & Root, Inc.*, 810 F.2d 529 (5th Cir. 1987); *Theriot v. J. Ray McDermott & Co.*, 742 F.2d 877 (5th Cir. 1984); *Williams v. Reading & Bates Drilling Co.*, 750 F.2d 487 (5th Cir. 1985).

[14] *Theriot, supra*, at p. 883.

He would have this Court ignore the actions of Louisiana's state court system and focus instead on the language to which they give lip service to do great violence to the maritime law.

Because Louisiana appellate review equates "manifest error" and "clear error" review, Butler urges, this Court should ignore a unique state constitutional provision which obviously gives its courts the authority to reverse decisions on the facts, even in the face of such language.

Because Louisiana has created a procedural system which deprives Jones Act defendants of their right to a jury trial, Butler would have this Court believe state judges are demi-Article III factfinders sitting in quasi-admiralty. There can be no other meaning. If Butler contends he is entitled to an award of prejudgment interest, absent a finding of unseaworthiness, he must, of necessity, contend Louisiana has achieved this unique status by passing a procedural statute.

This case, then, is not an argument between several states on one side and several states on the other, or a conflict between federal circuits. It is a conflict between Louisiana and everyone else. Because of Louisiana's historically large involvement in the maritime arena, the decision of the Court of Appeal, if allowed to stand, cannot help but have a substantive effect on the national law.

To prevent this, Zapata's application should be granted, and the Court of Appeal reversed in its entirety.

Respectfully submitted,

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